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A

ACTIONS.

See PRACTICE, CIVIL — ACTIONS.

ADMINISTRATION.

1. *Administrator — Mortgages — Trusts.*—Where the administrator of a mortgagee sold the property under the mortgage, and bought the property at such sale, and afterward sold it for a higher price, he did not thereby become a trustee for the mortgagor for the profits. He is a trustee for the beneficiary, but not for the debtor; as to the trust the debtor is a stranger. The administrator stands in the shoes of the deceased; and a mortgagee is not within the rule forbidding trustees or agents from purchasing estates with which they have been intrusted. If mortgagees are not, neither are their personal representatives.—Woodlee v. Burch, 231.
2. *Administrator — Responsibility to estate.— Semble:* that an administrator of a mortgagee, who sells the property under the mortgage, buys it himself, and sells it at a higher price, may be held accountable to the estate for the profit arising from such purchase and sale.— *Id.*

AGENCY.

1. *Agency — Consignment — Factor, sales by — Place of, how fixed.*— Where a consignment is made to a factor for sale, unaccompanied with instructions from the principal, and in the absence of an established usage of trade to the contrary, it may be presumed that the produce is intended to be sold at the residence of the factor. The intent of the principal, which, in such cases, is to be gathered from the circumstances, alone fixes the character of the contract between the parties as to the place of sale, and the factor is not at liberty to disregard it.— Phillips v. Scott, 86.
2. *Agency — Consignee, shipment of produce to other markets by; when authorized — Usage of trade.*— A consignee residing in St. Louis has no authority, merely by virtue of the consignment, to ship produce to another market for sale. Where evidence tends to prove the existence of a usage of trade which authorized commission merchants in St. Louis, in their discretion, to ship produce to other markets, an instruction to that effect might be given to the jury; but such usage, to be of any avail, ought to be so general and well established that it might for that reason be presumed to have entered into the contract, or that it had actually been brought home to the knowledge of the principal.— *Id.*

AGENCY—(*Continued.*)

3. *Agency — Factor — Advancements by — Power to sell, in case of.*—When a factor has made large advancements to his principal upon produce consigned to him, and disposal thereof becomes necessary to protect himself against loss, his discretion as to time, price, and place of sale, would be complete, and unlimited even by positive instructions. But if intended to be relied upon as a defense, such necessity should be properly pleaded; and the *onus* of proof would rest upon defendant to show such necessity.— *Id.*

4. *Agency — Evidence — Authority to receive lands on behalf of a bank in payment of debts, how shown.*—The authority of an attorney in fact of a bank to receive lands in satisfaction of drafts held by the bank, may be shown without proof of his appointment by a resolution or by-law of the board of directors. It may be inferred from the acts and conduct of the parties. And where the subsequent holder of the drafts accepted a transfer of the lands given in satisfaction thereof, and sold the lands under judicial proceedings against a prior indorser, to foreclose his right to redeem them, and received the proceeds of the sale, such acts are amply sufficient to show a ratification by the holder of the authority of the agent. And he cannot repudiate such an agreement between the drawer and the agent of the bank, even when made without his full knowledge and consent, and bring suit against the drawer for the remainder of the drafts unsatisfied by the sale of the lands, unless the drawer be placed in as good a situation as when the lots were conveyed to the agent.— Norton v. Bull, 113.

5. *Factors, rights of, as against their principals, concerning property in their possession.* — Parties in charge of gold dust as factors for another have no right to take their pay or compensation out of the gold dust. The gold dust is to be treated as property, and their compensation must be estimated in money.— McCune v. Erfort, 134.

6. *Insurance Companies — Agent — Authority.*— The authority of the soliciting agent of an insurance company to take applications for insurance carries with it the legal implication of authority to fill up the application and do all those things which may be needful in perfecting it.— Combs v. Hannibal Savings and Insurance Company, 148.

7. *Insurance, Fire — Application — False representations and warranties — Agency.*—Where an action on a fire-insurance policy was resisted, on the ground of false representations and warranties, in that the application of plaintiffs stated their title to the insured property to be an unencumbered fee simple, whereas it was in fact only an encumbered equitable title, testimony was competent showing that plaintiffs, before their application was drawn up, submitted to the inspection of the agent of the insurance company their title paper, being a bond for a deed on which a balance of one hundred dollars was then unpaid, and that the agent thereupon filled up the application in his own language, saying that it was "all right;" and that they, believing it to be so, signed the application without being aware of its peculiar phraseology, or that the answers "fee simple" and "no encumbrances" were in it. In this case the acts of the agent were the acts of the company, and his knowledge was theirs. And having taken the risks under such circumstances, knowing the facts, they cannot come in, after a loss has occurred, and avoid the policy by disproving the truth of their own statements, as contained in the application.— *Id.*

AGENCY—(*Continued.*)

8. *Damages, action for — Agency.*—No principle in the law is better established than that for the negligence or fault of the agent or servant, while engaged in the principal's service, the principal is liable.—Gass v. Coblens, 377.

See INSURANCE, 2.

ARBITRATION AND AWARD.

1. *Arbitration — Award — Witness — Signature.*— Where an award of arbitrators was filed in the office of the clerk of the Circuit Court without having any witness thereto, and was afterward taken out and the attestation of a witness procured, such proceeding was held to be irregular and to receive no sanction from the law.— Field v. Oliver, 200.

ASSIGNMENT, VOLUNTARY.

1. *Voluntary Assignment — Attachment — Attachment creditor claiming pro rata distribution.*— In case of a voluntary assignment under the statute, it is not necessary that an express assent should be given on the part of the creditor to enable him to take under the assignment. This consent will be presumed. But the presumption is not absolute or conclusive, and he may, if he will, reject or repudiate an assignment. But he cannot claim a benefit under it, and at the same time attack it for fraud and attempt to destroy its validity. He must make his election, and either take under it or disclaim it. A creditor cannot attach property in the hands of an assignee, and afterward claim a distributive share under the assignment.—Valentine v. Decker, 583.

ATTACHMENTS.

1. *Property attached under different attachments — Priority, how settled — Duty of officer making levy.*— The law (Gen. Stat. 1865, ch. 141, § 50) provides a mode of settling all questions of priority between different attaching creditors; and where the officer neglects these provisions and decides the questions himself, he does so at his own peril. And where he decides in favor of a void judgment, and pays over the money in his hands to satisfy it, and refuses to pay over to the holder of a valid judgment or attachment sufficient to satisfy such judgment or attachment, he commits a wrong for which he and his securities are responsible.— Howard v. Clark, 344.

2. *Garnishment — Indebtedness, when liable to.*—In order that an indebtedness may be liable to garnishment, it must be absolutely due as a money demand, unaffected by liens or prior encumbrances or conditions of contract.—Weil v. Tyler, 581.

3. *Voluntary Assignment — Attachment — Attachment creditor claiming pro rata distribution.*— In case of a voluntary assignment under the statute, it is not necessary that an express assent should be given on the part of the creditor to enable him to take under the assignment. This consent will be presumed. But the presumption is not absolute or conclusive, and he may, if he will, reject or repudiate an assignment. But he cannot claim a benefit under it, and at the same time attack it for fraud and attempt to destroy its validity. He must make his election, and either take under it or disclaim it. A creditor cannot attach property in the hands of an assignee, and afterward claim a distributive share under the assignment.—Valentine v. Decker, 583.

4. *Vendor and Purchaser —Judgment sale —Attachment — Lien —Priority.*— A *bona fide* purchaser of real estate who has failed to record his deed until

ATTACHMENTS—(*Continued.*)
after a judgment is obtained against the vendor, but who records it before a sale under the judgment, will hold it against a purchaser under the judgment; and this is true of a judgment and sale in a suit by attachment. (Stillwell v. McDonald, 39 Mo. 282, affirmed.)—Potter v. McDowell, 93.

ATTORNEY AT LAW.
See EVIDENCE, 22.

B

BAILMENT.
See AGENCY. CARRIERS.

BANKS AND BANKING.
1. *Revenue—National Banking Associations—Shareholders—Assessment of taxes—Construction of statute.*—Under the provisions of the forty-first section of the act of Congress, approved June 3, 1864, amendatory of an act to provide a national currency secured by a pledge of United States stocks (U. S. Laws 1863–4, p. 112), the tax imposed by State authority upon shareholders in national banking associations must be specifically assessed against the shareholders, and not against the capital of the bank itself. But the provisions of the "Act for the assessment and collection of the revenue in the State of Missouri," approved February 4, 1864 (Adj. Sess. Acts 1863, p. 69, §§ 19, 20), are in consonance with the act of Congress in this respect. By these sections the assessment is distinctly and separately required to be made against the shares, and under these provisions the shareholders are liable.—Lionberger v. Rowse, 67.
2. *Revenue—Act of Congress of June 3, 1864—Proviso—Construction of statute.*—The proviso of the forty-first section of the act of Congress of June 3, 1864, prohibiting the imposition of any greater tax than is levied upon the shares of banks organized under State authority, is simply inhibitory of any unjust or unwise discrimination being made, by which the national banks might be oppressed or taxed out of existence, and thus prevented from performing their proper functions as fiscal agents of the government; and it is no insuperable objection to the State law because this prohibition is not embraced in it.—*Id.*
3. *Revenue—State National Banking Acts of 1863—Obligation of Contract—Whether impaired by.*—The national banks organized under the State law of 1863 do not come within the terms of the contract made by the State and the banks organized under the law of 1857. From the period in which they were re-organized the previously existing contract between them and the State was mutually dissolved, and was no longer binding on either party.—*Id.*
4. *Revenue—United States National Banking Act of 1863—Limitation by, as to rate of State taxation—Construction of Statute.*—The proviso of the forty-first section of the national banking act (U. S. Laws 1863–4, p. 112), declaring that the tax upon the shares of the associations shall not exceed the rate imposed upon the shares of State banks, is not violated because two banks which have retained their distinctive State organization are taxed a less amount, according to their contract. The latter are exceptional cases, and not within the rules, spirit, or intention of the act of Congress. The banks

BANKS AND BANKING—(*Continued.*)
referred to in that proviso were not spoken of in any restrictive sense, but meant to include all moneyed associations, savings and banking institutions; and the idea cannot for a moment be entertained that, because two banking institutions choose to rely on their charter and avail themselves of a special privilege guaranteed to them, therefore Congress ever contemplated that the whole moneyed capital of the State should be secured by a like exemption.—*Id.*

5. *Bank Check — Presentment — Due diligence.*— When the holder of a bank check is prevented, by a state of things beyond his control, from presenting the check, or sending it to be presented, for payment, a delay is excusable. But where a delay of some three months is had, a reason for it must be shown. This requirement of due diligence of the holder will not be evaded by showing that the drawer had no funds in the hands of the drawee, unless it be made to appear that this want of funds was the result of some fraudulent act of the drawer or indorser. If the maker or indorser has been guilty of some fraudulent act concerning the check, as if he has had no funds in the hands of his supposed depositary, and has made no provision to meet his check, or has fraudulently withdrawn his funds before the presentation of his check, he cannot avail himself of the laches of the payee or holder as a defense against the check.—Moody v. Mack, 210.

6. *Banks — Branch bank, parts of parent banks.*— The branch banks established under the provisions of the act of the General Assembly entitled "An act to regulate banks and banking institutions, and to create the office of bank commissioner," approved February 17, 1857 (Sess. Acts 1856–7, p. 14), were not distinct and independent organizations; they only formed parts of the parent banks authorized by the amendment to the constitution in relation to banking, approved January 23, 1857. (Sess. Acts 1856–7, p. 6.)—Merchants' Bank v. Farmer, 214.

7. *Banks, liability of — Limitations as to time.*— The act of the Legislature of February 15, 1864 (Sess. Acts 1863–4, p. 13), entitled "An act amendatory of the act to regulate banks and banking institutions," which provided in section 3 of said act that all claims, dues, and demands of said banks not presented within two years should be forever barred, saving the usual disabilities, did not establish so unreasonable a period of limitation that the Supreme Court will declare the law unconstitutional. As it was an act that attracted almost universal attention, and but a small quantity of notes were in circulation, the owners of the notes had ample time to protect themselves; and if they failed to exercise the diligence necessary for that purpose, their loss is attributable solely to their own carelessness and neglect.— Stephens v. St. Louis National Bank, 385.

See AGENCY, 4.

BILLS AND NOTES.

1. *Note — Mortgage — Innocent indorsee — Title of, to land secured by.*— A *bona fide* indorsee of negotiable paper received before maturity is not affected by any latent equities between the original parties to it. But this rule is an incident of its negotiability, and is established by the law merchant; and the indorsee by such indorsement acquires no legal interest in property conveyed by deed of trust to secure the note. The mortgagee retains the legal title; and if the deed of trust is fraudulent and void, the indorsee of the note cannot

BILLS AND NOTES—(*Continued.*)

enforce it against an attaching creditor whose rights attached before the indorsement of the note.—Potter v. McDowell, 93.

2. *Note — Mortgage — Release.*— Three indorsements were procured upon a bill of exchange payable at four months, and certain lands were mortgaged to the indorsers to indemnify them. At maturity of the bill, another, payable at three months, drawn and indorsed by the same parties, was procured and discounted, and the proceeds applied to the payment of the first bill; and two of the indorsers, without the knowledge of the third, caused satisfaction of the first mortgage to be entered of record: *Held,* that such an entry, without the consent of the the third indorser, constituted no release, and that the mortgage remained as security for the new bill..—Thornton v. Irwin, 153.

3. *Bank Check — Presentment — Due diligence.*— When the holder of a bank check is prevented, by a state of things beyond his control, from presenting the check, or sending it to be presented, for payment, a delay is excusable. But where a delay of some three months is had, a reason for it must be shown. This requirement of due diligence of the holder will not be evaded by showing that the drawer had no funds in the hands of the drawee, unless it be made to appear that this want of funds was the result of some fraudulent act of the drawer or indorser. If the maker or indorser has been guilty of some fraudulent act concerning the check—as if he has had no funds in the hands of his supposed depositary, and has made no provision to meet his check, or has fraudulently withdrawn his funds before the presentation of his check—he cannot avail himself of the laches of the payee or holder as a defense against the check.—Moody v. Mack, 210.

4. *Promissory Note—Surety — Release — Extension.*—In order to discharge a surety upon a promissory note, the creditor must do some act by which he deprives himself of the right of proceeding at law in the collection of the obligation; and an agreement to grant extension, to avail the surety, must not only be founded upon a sufficient consideration, but it must operate as an estoppel on the creditor sufficient to prevent him from bringing an action before the expiration of the extended time.—Headlee, Adm'r, v. Jones, 235.

See EVIDENCE, 22.

C

CARRIERS.

1. *Common Carriers — Evidence — Way-bill — Manifest.* — Action was brought to recover the value of three boxes of goods shipped at St. Louis, on board of one of defendant's boats, to be delivered at the city of Leavenworth. These boxes were included in the bill of lading, and shipped, but not included in the receipt given at the point of destination. The court properly excluded a way-bill on the Hannibal and St. Joseph railroad, and the manifest of a steamboat plying between points on the line over which the goods had to pass, offered to explain the discrepancy between the receipt and the bill of lading.—Erb v. Keokuk Packet Company, 53.

2. *Carriers — Passenger — Damages — Contributory negligence.*—In an action of damages for negligence, unskillfulness, or criminal intent, the settled principle now is that it ought to be left to the jury to say whether, notwithstanding the imprudence of the injured person, the defendant could not, in the

CARRIERS—(*Continued.*)

exercise of reasonable diligence, have prevented the catastrophe.—Morrissey v. Wiggins Ferry Company, 380.

3. *Carriers—Passenger—Damages—Contributory negligence—Remote and direct cause of injury.*—In a suit under section 2, ch. 147, Gen. Stat. 1865, if the evidence shows that the deceased only remotely contributed to the accident, and that the agents and employees of the defendant were the direct and immediate cause, and might have prevented it by the exercise of prudence and care, the defendant is liable.—*Id.*

4. *Carriers, Common—Liability for losses caused by cold.*—In an action against a common carrier for damages caused by the freezing of certain casks of wine, where it appeared in evidence that the cold weather was not the sole, nor entirely the proximate, cause of the injury, and that the loss would not have taken place nor the damage occurred had not the negligence and inattention of defendant co-operated with the cold: *held*, that plaintiff was entitled to recover for the loss of the merchandise. Where no restriction is stipulated for, the common carrier is held liable as an insurer, and is responsible in that high degree of diligence commensurate with the duties he assumes. And his liabilities will extend to agencies which the violence of nature causes in consequence of his negligence or defective means.—Wolf v. American Express Company, 421.

5. *Carriers, Common—Act of God, losses caused by—Carrier responsible for, in what cases.*—The act of God which excuses the carrier must not only be the proximate cause of the loss, but the better opinion is that it must be the sole cause. And when the loss is caused by the "act of God," if the negligence of the carrier mingles with it as an active and co-operative cause he is still responsible.—*Id.*

6. *Carriers, Common—Damages caused by want of reasonable care, skill, and attention—Burden of proof.*—After the damages to the goods have been established, the burden of proof lies upon the carrier to show that they were occasioned by the act or peril which the law recognizes as constituting an exemption; and then it is still competent for the owner to show that the injury might have been avoided by the exercise of reasonable skill and attention on the part of the persons employed in the conveyance of the goods. Such a loss will not be held to exempt the carrier from liability, but to have been occasioned by his negligence and inattention to duty.—*Id.*

7. *Carriers, Common—What degree of attention and care required, determined by the character of the goods.*—The carrier must not only exercise diligence, but he must use that degree of attention and care which the occasion and subject committed to his trust demand. What would be sufficient care in case of ponderous articles, not liable to be deteriorated by exposure, might be the most palpable neglect in case of costly and perishable goods.—*Id.*

CITY ORDINANCES.

See ORDINANCES, CITY.

CONGRESS.

See ST. LOUIS, CITY OF, 10.

CONSTITUTION.

1. *Unconstitutional Law—Where a court could interpose.*—The unconstitu-

CONSTITUTION—(*Continued.*)
tionality of a law must plainly appear before the court could interpose.—Stephens v. St. Louis National Bank, 385.
See REVENUE, 8, 9. STATUTE, CONSTRUCTION OF, 3.

CONTRACTS.
1. *Contract — Sale — Levy — Estoppel.* — If, after an alleged purchase of goods, the vendees caused an execution to be levied on them as the property of the vendor, this was a solemn admission on their part that the goods were, at the time of the levy, the property of the vendor; and they are estopped from claiming the goods in any other way than by virtue of said levy, even although the evidence showed they did not intend by such levy to abandon their alleged purchase, and acted under advice from counsel that their title to the property would not be affected thereby.—Field v. Langsdorf, 32.
2. *Contracts — Assumpsit — Specific contract — Burden of proof.* — Where plaintiffs contracted to deliver to defendant a specific quantity of wheat, exceeding the amount actually delivered by them to defendant, they cannot recover anything in an action of assumpsit for the value of the wheat delivered. But the burden of proving such a contract is upon the defendant.—Church v. Fagin, 123.
3. *Gold Dust — Value of, how estimated.* — Gold dust has no established value, and is not a legal tender. It is an article of commerce, like other property; and its value must be estimated in the lawful money of the country, and can only be ascertained by evidence of its value in such money.—McCune v. Erfort, 134.
4. *Contracts, rescission of, may be insisted upon, in what case.*—Where, in a contract of sale of land, the defect or diminution or incapacity in the property is large, and substantial compensation cannot be made, the purchaser may, in proper time and way, insist upon a rescission of the entire contract. But where the substance of the contract can be executed, it will stand, and the remedy of the purchaser is in the way of compensation.—Hart v. Handlin, 171.
5. *Contracts, right of rescission of, need not be insisted upon—May be insisted upon at what time.*—Where the purchaser has an undoubted right of rescission of his contract on discovery of the defect, he is not bound to exercise that right. He can affirm the contract and look to the vendor for compensation. He has his election to affirm or rescind the contract; but he is bound to make that election at once, on discovering the existence of the defect. He is not at liberty to hesitate and delay, and wait for a future view of his convenience or the market value of the property, before determining the question of his affirmance or rescission of the contract.—*Id.*
6. *Contract — Breach — Damages — Waiver.*—Where a contract is entered into for the conveyance of a certain described parcel of land, for a valuable consideration, and the bargainor conveys to the bargainee other described and less valuable land instead, there is a manifest and material breach of the contract, and the bargainor is liable in damages therefor, unless there has been a waiver by the bargainee or an acceptance by him of something else in satisfaction.—Dougherty v. Stamps, 243.
7. *Contract — Breach — Damages — Fraud.* — In such a case the question of fraud, suppressions, or misrepresentations, on the part of the bargainor, is immaterial so far as the bargainor's right to recover such damages is concerned. —*Id.*

CONTRACTS—(*Continued.*)

8. *Contract — Breach — Rescission — Requisite vigilance.*—Where a purchaser examines property before the sale is concluded, and occupies it for a month or so after the sale without manifesting discontent: *semble*, that it is then too late to complain or rescind the contract. The law expects purchasers to exercise a reasonable degree of vigilance in looking after their affairs, and that they will act with reasonable promptitude.—*Id.*

9. *Evidence — Contract — Parol agreement.*— It is a general rule that extrinsic evidence cannot be admitted to contradict, add to, subtract from, or vary, a written contract. Parties may, by a subsequent parol agreement, upon a sufficient consideration, change the mode of payment or other terms of their written contract, or they may discard it altogether; and it makes no difference how soon after the execution of the written contract the parol one was made, if, in fact, it was subsequent, and not otherwise objectionable. But (where the written agreement was neither incomplete nor uncertain in its terms) the parol contract, to be admissible, must be independent, and not explanatory or contradictory, of the written one.—Bunce, Adm'r, v. Beck, 266.

10. *Contract—Fixtures—Permission to occupy land of another, effect of.*—A building or other fixture which is ordinarily a part of the realty is held to be personal property when placed on the land of another by contract or consent of the owner; and it need not be a trade fixture.—Hines v. Ament, 298.

11. *Contract — Land — Permission to occupy, equivalent to what.*— The permission to occupy land for a series of years with certain property, and the direction to remove it, are equivalent to an original agreement to place it there. It is not to be confounded with the principle that a fixture placed upon land by a trespasser becomes a part of the realty.—*Id.*

12. *Promise, when implied.*—The law implies a promise where there is an antecedent legal duty and obligation—as, where services are rendered on the employment of a party, the law will imply a provision on the part of the employer to make payment therefor. And the rule applies to employment of counsel by counties or their agents. But the facts showing such legal obligation must be made to appear.—Kelley v. Andrew County, 388.

13. *Contracts — Sale — Resale of goods forwarded — Money paid by mistake, action for.*—Where defendant agreed to furnish plaintiff's intestate with tobacco for resale by the latter, and by the terms of the contract the purchase money did not become due until after the resale was effected, and the testimony showed no pretense that the property was taken to sell on commission, or that it was in any event to be returned and the sale treated as ineffectual: *held*, that the provision in relation to the payment did not suspend the transfer of the title, but that the sale was complete and the title passed when the goods were delivered and the purchaser put in possession and control of them. In such case the property would, after the transfer, be at the risk of the plaintiff; and *semble*, that, in case of loss thereof by fire, plaintiff could not recover back money unadvisedly paid for the same by his clerk.—Blow, Adm'r, v. Spear, 496.

14. *Contracts—Sale—Property delivered to be paid for on resale, not returned in a reasonable time—Presumption.*—Where property is sold and delivered, to be paid for upon a resale, the purchaser must either return the money or the property, whatever may happen in the meanwhile. If the property is not returned in a reasonable time, a resale will be presumed.—*Id.*

CONTRACTS—(*Continued.*)

15. *Contract, action on—Omission of stamp, effect of under acts of Congress, where evidence showed no intention to evade provisions of the acts.*—Where defendant, in his answer to an action on a contract which was unstamped at the commencement of the suit, admitted the execution of the instrument without alluding to its legality under the stamp acts: *held*, that he thereby admitted its validity, and, *semble*, that he could not raise that issue afterward; and *held*, also, that even if he raised the question by the pleading, it was competent to show that the omission was not made "with intent to evade the provisions of the act" of Congress requiring the stamp.—Whitehill v. Shickle, 537.

16. *Contract agreeing upon no mutuality of losses, not a partnership.*—Where a contract contained an express provision to indemnify one of the parties for all loss of capital advanced by him in the business during the first four months, and to pay him for the value of his services during that time, in case he should then leave, with the proviso only that he should, at the end of that time, make a correct exhibit of the business; and the contract further stipulated that thereafter, if the business continued, there should be a mutual share of the profits and losses: *held*, that up to the expiration of the first four months no partnership existed under the contract.—*Id.*

17. *Contract—Partnership, mutuality of losses necessary to.*—To constitute a partnership between the parties themselves, there must be a communion of profits between them. A communion of profits implies a communion of losses. Neither reason nor authority seems to favor the rule that there may be a legal and valid partnership although one or more of the partners are guaranteed by the others against loss.—*Id.*

18. *Contract—Partnership—Covenant, action on may be had in law.*—Even where a party to a contract was held to be a partner by the terms of the contract, yet, if it contained an express covenant to pay him his losses, or the amount of his advances less his receipts, at the end of a specified time, an action at law on the covenant may properly be resorted to, and a bill in equity calling for a settlement of partnership accounts is unnecessary.—*Id.*

19. *Contracts—Averments—Penalty—Assignment of breaches.*—A general statement that a party "totally disregarded all, and did not fulfill any, of the covenants and stipulations to be kept and performed, and made by him," etc., is too general to support a demand at law, especially for a penalty. In claiming a penalty, specific breaches must be assigned.—*Id.*

See INSURANCE. LANDLORD AND TENANT. ORDINANCES, CITY, 4.

CONVEYANCES.

1. *Vendor and Purchaser—Judgment sale—Attachment—Lien—Priority.*—A *bona fide* purchaser of real estate who has failed to record his deed until after a judgment is obtained against the vendor, but who records it before a sale under the judgment, will hold it against a purchaser under the judgment; and this is true of a judgment and sale in a suit by attachment. (Stillwell v. McDonald, 39 Mo. 282, affirmed.)—Potter v. McDowell, 93.

2. *Conveyances—Mistakes in deeds—Equity—Relief—Purchaser with notice.*—In all cases of mistakes in deeds, courts of equity will interfere as between the original parties, or those claiming under them in privity, such as personal representatives, heirs, devisees, legatees, assignees, voluntary grantees, or judgment creditors, or purchasers from them with notice of the

CONVEYANCES—(*Continued.*)

facts. And this is true even where the property embraced in the deed has been sold upon execution. But the mistake must be clearly proved, and the present indebtedness of him who executed the deed to the grantee therein must be established. And in case of such privity in a deed of trust given to secure an indorser who has paid the note indorsed, and is not otherwise reimbursed, the mistake set forth should be corrected.—Young v. Coleman, 179.

3. *Conveyances, mistakes in — Equity — Relief — Estoppel.*— Plaintiff in such an action is not estopped from securing relief because the land had been previously sold under judgment execution in his favor, unless he directed the land to be sold, or received a portion of the proceeds.— *Id.*

4. *Conveyances — Deeds of trust — Surplus funds.*—A party to whom land was conveyed subject to a deed of trust became thereby substituted to the place and right of the grantor, and as such was entitled to receive the surplus funds remaining after the sale under the trust deed.—Reid v. Mullins, 306.

5. *Conveyances—City of St. Louis—Deed by Mayor need not recite his authority to act.*— Where, under a resolution of the city council of St. Louis which directed the mayor to execute a deed of certain real estate to the legal representatives of A., and the deed was made to B. without stating that he was the legal representative of A., but recited that it was made under a compromise sale in pursuance of a resolution of the city council, naming the date when the resolution was approved: *held*, that the deed contained a good title on its face, and must be considered presumptive or *prima facie* evidence of title. Deeds by municipal officers acting under ordinances or resolutions of the law-making power of the corporation need not recite the ordinances or resolutions, nor show on their face that the contingency has happened which would authorize the sale.—Jamison v. Fopiana, 565.

See EQUITY, 6. MORTGAGES AND DEEDS OF TRUST. SALES.

CORPORATIONS.

1. *Corporations — Railroad — Notice of appropriation and condemnation of land — What sufficient.*— The "substance" and material matters of which the statute concerning the appropriation and condemnation of lands for railroad purposes (Gen. Stat. 1865, p. 352, § 2) intended that notice should be given, are the proceedings to take measures to subject the property to the uses designated and say what damages shall be paid therefor. And where the publication notifies the owner that the petitioner will make application to the judge of the Circuit Court at a certain time and place, and the object sought to be accomplished is precisely and plainly stated, and the land, which is the subject of the proceedings, described, it imparts to him all necessary information, and apprises him of everything essential touching the premises.—Quincy and Palmyra Railroad Company v. Taylor, 35.

2. *Corporations — Liability for debts in excess of capital — Stockholding creditors — Construction of statute.*— Where debts contracted by a corporation in pursuit of its business exceeded the amount of its capital stock actually paid in, the directors are liable for such excess to such parties as really held debts against the company, under the provisions of section 20 of article I of the act concerning corporations (R. C. 1855, p. 374), even although the creditors were stockholders in the corporation.—Anderson v. Blattau, 42.

3. *Corporations, Railroad—Damages—Servant, injury to by fellow-servant.*—

CORPORATIONS—(*Continued.*)

A servant of a railroad corporation who is injured by the negligence or misconduct of his fellow-servant can maintain no action against the master for such injury, unless the servant by whose negligence or misconduct the injury is occasioned is not possessed of ordinary skill and capacity in the business intrusted to him, and the employment of such incompetent servant is attributable to the want of ordinary care on the part of the master.—Rohback v. Pacific Railroad, 187.

4. *Corporations, Railroad — Servants — Construction of statute.*—Servants and employees of a railroad corporation are not to be included in the designation "any person," according to the true meaning of the act concerning railroad companies. (Gen. Stat. 1865, p. 342, ch. 63, § 38.)—*Id.*

5. *Corporations — Ordinances, validity of, how tested.*—The real test of all ordinances passed by an incorporated body is the intention of the Legislature in granting the charter. Corporations cannot make ordinances contrary to their constitution.—Ruggles v. Collier, 353.

6. *Corporations — Legislative and ministerial powers, delegation of.*—There is a clear distinction between legislative and ministerial powers. The latter may be delegated; the former cannot. Legislative power implies judgment and discretion on the part of those who exercise it, and a special confidence and trust on the part of those who confer it.—*Id.*

7. *Hannibal Savings and Insurance Company — Membership — Stock department — Who may be insured in.*—Section first of the charter of the Hannibal Savings and Insurance Company, which provides, substantially, that "George W. Kent," etc., "and all other persons who shall hereafter become members of the company, shall be a body politic, for the purpose of insuring their farm buildings, live stock, dwelling-houses," etc., is intended simply to give a leading object of the charter; and, under the provisions of other sections, the company may, in the stock department, insure without regard to membership.—Hannibal Savings and Insurance Company v. Pipe, 407.

8. *Corporations — Stockholders — Individual liability — Construction of statute.*—Under the provisions of section 6, art. VIII, of the constitution of Missouri (Gen. Stat. 1865, p. 40), and section 11, chapter 62, of the General Statutes (Gen. Stat. 1865, p. 328, § 11), which declare and provide for enforcing the liability of each stockholder, over and above the stock by him or her owned and the amount unpaid thereon, in a further sum at least equal in amount to such stock, such liability attaches to those who are actually stockholders when the execution is issued, and not to those who were stockholders when the debt was contracted, and who have transferred their stock in good faith to responsible parties.—McClaren v. Franciscus, 452.

9. *Corporations — Stockholders — Individual liability, when it can be resorted to.*—The debt is in the first place the debt of the corporation, and not of the individual stockholder; and the remedy against the corporation must be exhausted and proved ineffectual before resort can be had to the private stockholder.—*Id.*

10. *Corporations — Stockholders — Individual liability — Transfer of stock to irresponsible parties.*—The law is well settled that no member of a corporation can exonerate himself from liability, or defeat the claims of creditors, by transferring his interest to an insolvent person or a bankrupt. The members of a corporation, therefore, who would be liable, if they continued members,

CORPORATIONS—(*Continued.*)
to the creditors of the corporation, may still be treated as members if they have disposed of their interest to an insolvent, or with the view of exonerating themselves from their personal responsibility.—*Id.*

11. *Charter—Corporations, acts of must be performed comformably to requirements of charter.*—The rule is well settled that corporations are the mere creatures of the law, established for special purposes, and deriving all their powers from the acts creating them. The corporate acts must not only be authorized by the charter, but these acts must be done by such officers or agents, and in such manner, as the charter directs.—City of St. Louis to use of Murphy v. Clemens, 395.

See JUSTICES' COURTS, 4.

COUNTY ATTORNEY.
See OFFICERS, 2, 3.

COUNTY TREASURER.
See OFFICERS, 4, 5, 6.

COURTS, CIRCUIT.
See PRACTICE, CIVIL.

COURTS, CIRCUIT, ST. LOUIS.
See PRACTICE, CIVIL—APPEAL, 5, 6, 8.

COURT, COMMON PLEAS, OF GREENE COUNTY.
See JURISDICTION, 5.

COURT, COMMON PLEAS, HANNIBAL.
See JUSTICES' COURTS, 3.

COURTS, COUNTY.

1. *County Court — Schools — Mortgages — Power of sale by court without notice — Construction of statute.*—Where the owner of land borrowed five hundred dollars of the County Court, and secured the amount, under the provisions of the school act of 1839, by mortgage of the land, the court properly ordered the sheriff to sell, and he properly proceeded to sell the premises without giving the mortgagor notice of their proceedings. (R. C. 1855, pp. 1424–5, §§ 23–27, 30.) The ten days' notice mentioned in section 18 of the school act (R. C. 1855, p. 1424, § 24) refers expressly to the order to give a new security or make such payment as is necessary for the security of the fund, and not to the fact that the interest or the mortgage note is due.—Hurt v. Kelly, 238.

2. *County Court — Mortgage — Power of Legislature.*—The Legislature has power to authorize such a sale without notice, where the mortgagor, in the mortgage itself, gives express authority to that effect.—*Id.*

COURT OF CRIMINAL CORRECTION.
See HUSBAND AND WIFE, 3, 4. PRACTICE, CRIMINAL, 5.

COURT CLERKS.
See EXECUTION, 7. MANDAMUS, 1. STATUTE, CONSTRUCTION OF, 3.

COURT, DISTRICT.

1. *Practice — District Court — Exception to action of.*— Sections 27 *et seq.*, chap. 169, Gen. Stat. 1865, relate exclusively to the practice and proceedings in the Circuit Courts, and have no reference to the District Court. That exceptions to the action of the District Court should be saved, in order to

COURT, DISTRICT—(*Continued.*)

bring causes to this court, would only be required by resorting to an act of judicial legislation. And, in the absence of any direct statutory requirement, there is no apparent reason why a party should be compelled to except in the District Court. A bill of exceptions will only lie to review a decision made at the trial of a cause; and if it be so framed as to show that the exception was taken to a decision *in banc*, made after the trial, an appellate court cannot look into it. Hence, this court will overrule a motion to dismiss an appeal for want of such exceptions.—Quincy & Palmyra R.R. Co. v. Taylor, 35.

2. *District Court—Power of Legislature to repeal statute concerning.*—The Legislature has power to repeal chapter 135 (Gen. Stat. 1865), concerning District Courts. But, under section 12, art. VI, of the State constitution, no case can reach the Supreme Court, either by appeal or writ of error, except on final judgment taken from one of these courts; and the repeal of the law providing for their organization, while this constitutional provision remains in force, would effectually stop all cases from being brought to the Supreme Court.—Governor, Opinion in response to, 351.

See PRACTICE, CIVIL—APPEAL, 4, 5, 8.

COURT, PROBATE.

See JURISDICTION, 5.

COURT, SUPREME.

See PRACTICE—SUPREME COURT.

CRIMES AND PUNISHMENTS.

See PRACTICE, CRIMINAL.

CRIMINAL LAW.

See EVIDENCE, 10, 11. HUSBAND AND WIFE, 3, 4. PRACTICE, CRIMINAL.

D

DAMAGES.

1. *Dower, action for recovery of—Deforcement—Damages.*—In an action under section 22, chap. 130, Gen. Stat. 1865, for the recovery of dower in certain lands, it is the duty of the jury to find from the evidence before them what is the reasonable net yearly value of the land, without reference to any improvements, and after deducting the taxes, if such land had been reasonably used by the owner; and it is for the plaintiff to prove the amount of damages she has sustained by reason of her deforcement.—Thomas v. Mallinckrodt, 58.

2. *Dower—Deforcement—Assessment of damages for, up to what time.*—The design of sections 22 and 30, chap. 130, Gen. Stat. 1865, is that damages for deforcement shall be assessed up to the time when the report of the commissioners appointed to admeasure dower is approved by the court, and not merely till the time when the same is presented.—*Id.*

3. *Corporations, Railroad—Damages—Servant, injury to by fellow-servant.*—A servant of a railroad corporation who is injured by the negligence or misconduct of his fellow-servant can maintain no action against the master for such injury, unless the servant by whose negligence or misconduct the injury is occasioned is not possessed of ordinary skill and capacity in the business intrusted to him, and the employment of such incompetent servant is attributable to the want of ordinary care on the part of the master.—Rohback v. Pacific Railroad, 187.

DAMAGES—(*Continued.*)

4. *Corporations, Railroad — Servants — Construction of statute.* — Servants and employees of a railroad corporation are not to be included in the designation "any person," according to the true meaning of the act concerning railroad companies. (Gen. Stat. 1865, p. 342, ch. 63, § 38.) — *Id.*

5. *Damages, action for — Agency.* — No principle in the law is better established than that for the negligence or fault of the agent or servant, while engaged in the principal's service, the principal is liable. — Gass v. Coblens, 377.

6. *Carriers — Passenger — Damages — Contributory negligence.* — In an action of damages for negligence, unskillfulness, or criminal intent, the settled principle now is that it ought to be left to the jury to say whether, notwithstanding the imprudence of the injured person, the defendant could not, in the exercise of reasonable diligence, have prevented the catastrophe. — Morrissey v. Wiggins Ferry Company, 380.

7. *Carriers — Passenger — Damages — Contributory Negligence — Remote and direct cause of injury.* — In a suit under section 2, ch. 147, Gen. Stat. 1865, if the evidence shows that the deceased only remotely contributed to the accident, and that the agents and employees of the defendant were the direct and immediate cause, and might have prevented it by the exercise of prudence and care, the defendant is liable.—*Id.*

8. *Practice, Civil — Instructions are to be taken together.* — In an action for damages against a street-railway company for injuries resulting from the carelessness and negligence of defendant, if it appeared that plaintiff in any manner directly contributed to such injuries by his own wrongful or negligent act, he cannot recover. And an instruction given to the jury after they had retired to consider of their verdict, omitting the element of contributory negligence, if standing alone, would undoubtedly be bad. But if that point was fully met by other instructions, such omission would be no ground for reversal of the cause. Instructions are to be considered and construed in their combination and entirety, and not as though each separate instruction was intended to embody the whole law of the case. — McKeon v. Citizens' Railway Company, 405.

9. *Damages—Street railways—Negligence causing death must be direct cause.* — In actions, under the statute, against a railroad company, of damages for killing, caused by the negligence of defendant, the negligence of the deceased, in order to defeat the action, must have been the direct and proximate, and not the indirect and remote, cause of the death. — Meyer v. People's Railway Company, 523.

10. *Carriers, Common — Liability for losses caused by cold.* — In an action against a common carrier for damages caused by the freezing of certain casks of wine, where it appeared in evidence that the cold weather was not the sole, nor entirely the proximate, cause of the injury, and that the loss would not have taken place nor the damage occurred had not the negligence and inattention of defendant co-operated with the cold: *held*, that plaintiff was entitled to recover for the loss of the merchandise. Where no restriction is stipulated for, the common carrier is held liable as an insurer, and is responsible in that high degree of diligence commensurate with the duties he assumes. And his liabilities will extend to agencies which the violence of nature causes in con-

DAMAGES—(*Continued.*)
sequence of his negligence or defective means.—Wolf v. American Express Company, 421.

11. *Carriers, Common — Damages caused by want of reasonable care, skill, and attention — Burden of proof.* — After the damages to the goods have been established, the burden of proof lies upon the carrier to show that they were occasioned by the act or peril which the law recognizes as constituting an exemption; and then it is still competent for the owner to show that the injury might have been avoided by the exercise of reasonable skill and attention on the part of the persons employed in the conveyance of the goods. Such a loss will not be held to exempt the carrier from liability, but to have been occasioned by his negligence and inattention to duty.—*Id.*

See CONTRACTS, 6, 7. PRACTICE, CIVIL—APPEAL, 1, 2. RAILROADS, 4.

DEEDS OF TRUST.
See MORTGAGES.

DEMAND.
See PRACTICE, CIVIL, 3. PRACTICE, CIVIL—PLEADINGS, 4.

DIVORCE.

1. *Divorce — Recrimination — Cross-petition.*—In this State the rule has been long established that, in reply to an application for divorce, the defendant may allege, either by way of recrimination or cross-petition, the commission by the plaintiff of any offense that, by the statute, is made a cause for divorce. The least that can be required is that parties should come into court with hands so far clean that the opposite party is not entitled to the same redress against them. If both parties have a right to a divorce, neither party has. The court must discriminate between them; must say which is the injured party, and which is entitled to relief.—Hoffman v. Hoffman, 547.
2. *Divorce — Practice, Civil — Pleadings.*—In a suit for divorce grounded upon absence without reasonable cause for the space of one year, the gist of the action is the willful absence without cause, and the petition should set forth facts which should advise the court that defendant has kept away against the will of the petitioner.—*Id.*

DOWER.

1. *Dower, action for recovery of — Deforcement — Damages.* — In an action under section 22, chap. 130, Gen. Stat. 1865, for the recovery of dower in certain lands, it is the duty of the jury to find from the evidence before them what is the reasonable net yearly value of the land, without reference to any improvements, and after deducting the taxes, if such land had been reasonably used by the owner; and it is for the plaintiff to prove the amount of damages she has sustained by reason of her deforcement.—Thomas v. Mallinckrodt, 58.
2. *Dower—Deforcement — Assessment of damages for, up to what time.*—The design of sections 22 and 30, chap. 130, Gen. Stat. 1865, is that damages for deforcement shall be assessed up to the time when the report of the commissioners appointed to admeasure dower is approved by the court, and not merely till the time when the same is presented.—*Id.*
3. *Dower — Election, right of — Statute.*— The right of election by the widow of her dower is a statutory privilege conferring new and important benefits, and outside of the statute has no existence. It must therefore be exercised in substantial compliance with it.—Price v. Woodford, 247

DOWER—(*Continued.*)

4. *Dower — Election, right of — Notice of — Construction of statute.*— Section 9 of the act concerning dower, R. C. 1855 (Gen. Stat. 1865, ch. 130, § 9), providing that the court shall cause notice to be given the widow, apprising her of her right of election, is directory only; and a failure to comply with this statutory requirement will not have the effect of enlarging the time within which the widow must make her election.—*Id.*

E

EJECTMENT.

See LAND TITLES, 1. LIMITATIONS, 1. PRACTICE, CIVIL—ACTIONS, 4, 5. PRACTICE, CIVIL—PLEADINGS, 1, 8, 10.

ELECTIONS.

1. *Elections, volunteer, of what effect.*— The omission to hold an election in 1866 could not be supplied by a subsequent one not provided for by law, and such election would be wholly void and of no effect.— State *ex rel.* McHenry v. Jenkins, 261.

2. *Election — Contestant — Petition — Time of filing.*—Under the provisions of the statute (Gen. Stat. 1865, ch. 2, § 80), the petition of a party contesting the election of circuit judge will be dismissed unless the contestant present such petition to this court (or to a judge thereof in vacation) within forty days, and serve the contestee with a copy of the petition and notice within thirty days next succeeding the election.—Wilson v. Lucas, 290.

See OFFICERS, 7. STATUTE, CONSTRUCTION OF, 3.

EQUITY.

1. *Practice — Pleading — Joinder of causes of action — Equity — Ejectment.*— Proceedings instituted by plaintiff for the purpose of vacating the title to real estate and vesting the same in himself, and at the same time to eject the defendant and have possession of the premises awarded to himself, are fatally erroneous on writ of error or appeal, and cannot be sustained. (Peyton v. Rose, 41 Mo. 257, cited and affirmed.)— Curd v. Lackland, 139.

2. *Practice, Civil — Pleadings — Causes, legal and equitable — Misjoinder.*— A petition containing in the same count a prayer for equitable relief, and also for rents and profits and for possession of the premises, is bad for misjoinder. The statute requiring the separate statement of legal and equitable causes of action should be strictly observed. But in such cases the equitable claim can be considered, and the rest of the petition may be treated as surplusage.— Young v. Coleman, 179.

3. *Conveyances — Mistakes in deeds — Equity — Relief — Purchaser with notice.* —In all cases of mistakes in deeds, courts of equity will interfere as between the original parties, or those claiming under them in privity, such as personal representatives, heirs, devisees, legatees, assignees, voluntary grantees, or judgment creditors, or purchasers from them with notice of the facts. And this is true even where the property embraced in the deed has been sold upon execution. But the mistake must be clearly proved, and the present indebtedness of him who executed the deed to the grantee therein must be established. And in case of such privity in a deed of trust given to secure an indorser who has paid the note indorsed, and is not otherwise reimbursed, the mistake set forth should be corrected.—*Id.*

EQUITY—(*Continued.*)

4. *Conveyances, mistakes in — Equity — Relief — Estoppel.* — Plaintiff in such an action is not estopped from securing relief because the land had been previously sold under judgment execution in his favor, unless he directed the land to be sold or received a portion of the proceeds.—*Id.*
5. *Sale — Gross inadequacy of consideration — Fraud.*—As a general proposition, inadequacy of consideration is not of itself a distinct principle of relief in a court of equity. Nevertheless, where the transaction discloses such unconscionableness as shocks the moral sense and outrages the conscience, courts will interfere to promote the ends of justice and defeat the machinations of fraud.— Hannibal & St. Joseph Railroad Company v. Brown, 294.
6. *Equity — Action to set aside conveyance of land on ground of fraud, what circumstances warrant.*— In an action to annul the conveyance of certain lots of land, given in exchange for certain shares of stock, on the ground that the conveyances were obtained through false and fraudulent representations and suppressions touching the financial standing, condition, and prospects of the company, and the value of its stock: *held*, that a court will not rescind such a contract without the clearest proof of the fraudulent misrepresentations, and that they were made under such circumstances as show that the contract was founded upon them.— Bryan v. Hitchcock, 527.
7. *Equity—Action to enjoin recovery in ejectment—Fraud—Prior possession.*— A., the owner of certain real estate, many years after its purchase, discovered that the acknowledgment of the conveyance by the original grantor was defective, and procured from B., his only heir, a quit-claim deed of the property. Shortly prior to the date of said deed, C., by false inducements, had obtained from B. another deed of quit-claim for the same property, and, some time after the making of the deeds, brought suit of ejectment against A. In an action to enjoin a recovery of C. in the ejectment suit, in consequence of such fraud: *held*, that A., as well as B., could properly institute proceedings in the injunction.— Smith v. Harris, 557.
8. *Equity — Assignment of naked right to property — Prior possession.* — Although the grantor of real estate who was entitled to have the conveyance set aside for fraud cannot assign his naked right of action in order that his assignee may sue in his own name, yet where the right of the assignee to the property did not depend alone upon the assignment, but his purchase, interest, and possession were long antecedent thereto, and the taking a deed from the assignor was only a step to protect that purchase, the grantor may proceed in his own name by injunction.—*Id.*
9. *Equity—Railroad, sale of—Act of Legislature confirming—Rescission and cancellation—Jurisdiction.*— Where, pending a bill in equity for rescission of the sale of a railroad by the governor, and also for an account and for damages, an act was passed by the Legislature confirming the sale, although the act is a complete bar to that part of the petition which demanded rescission, yet the court is not thereby deprived of all jurisdiction of the cause, but jurisdiction will be retained and justice administered as to the remaining portion of the petition.— State v. McKay, 594.
10. *Equity — Railroad, sale of—Reseizure under clause of forfeiture in deed does not ratify.*—After sale of a railroad by the governor, under an act of the Legislature, his seizure of the same, under and by virtue of a clause of forfeiture contained in the act and the deed of conveyance, was not an admission

EQUITY—(*Continued.*)

by the State that the sale and transfer were legal, nor did the seizure amount to a ratification of the sale. In the sale, the governor was not acting in his political or executive capacity, but merely as a special agent; and the duty might have devolved upon any other person as well. And if he proceeded beside the law or outside the law, the State would not be bound by his tortious acts or trespasses.— *Id.*

11. *Equity — Railroad, sale of — Reseizure by governor — Clause of forfeiture like one of re-entry by landlord.*—Where, after the sale of a railroad by the governor, seizure was made on account of a non-compliance with the terms of the contract, for the purpose of foreclosing the State's lien or mortgage, the clause of forfeiture was not distinguishable in principle from one of re-entry by a landlord for condition broken; and such seizure, even if in all respects legal and regular, did not deprive the State of any previous existing right.— *Id.*

12. *Equity — Railroad, sale of, by commissioners — Action for rescission, account, and damages — What damages plaintiff is entitled to, and against whom.*— If the commissioners for the sale of a railroad combined and confederated with other persons in the purchase of the property, the State will be entitled to whatever speculations they made out of the sale; and the other persons, by entering into the league with the full knowledge of the facts, will also be amenable.— *Id.*

13. *Practice, Civil — Pleading — Joinder of causes in law and equity, how treated by courts.*—Where plaintiff's petition combined an action at law and a suit in equity, and the trial was as of a proceeding in equity, a judgment rendered therein as though the trial had been that of a suit in ejectment can not be sustained. (Peyton v. Rose, 41 Mo. 257, cited and affirmed.) Either the chancery branch of the case must be rejected as surplusage, and a trial and judgment had as of a suit at law, or the law branch must be rejected, and a trial and judgment had in accordance with the rules of chancery practice.— Wynn v. Cory, 301.

14. *Practice, Civil — Recovery of land — Chancery — Relief — Ejectment.*— Where the title to real estate has been vested in a grantee by a deed duly executed and delivered, and such deed has been lost or destroyed without being recorded, a court of equity will lend its aid to protect the rights of the grantee and those claiming under him, by enjoining the grantor and his heirs and legal representatives from selling the property, and by divesting them of the title and vesting it in the grantee or those entitled to it under him. But he must establish his title thereto by a bill in chancery, with an appropriate prayer for relief. Until this is done he cannot sue for possession of the land.— *Id.*

15. *Practice, Civil — Pleadings — Answer — Negative pregnant — Ambiguity — Construction of statute.*—Where plaintiff's petition alleged that "on or about the 9th day of March, 1852, Archibald Peery, being the owner of the land hereinafter described, in fee simple, made, executed, acknowledged, and delivered to Henry W. Peery a deed by which he conveyed to said Henry W. the land in question," and defendant's answer thereto was in the following words: "The defendant denies that the said Archibald Peery, on the 9th day of March, 1852, or at any time before or since, made, executed, acknowledged, and delivered to Henry W. Peery a deed by which he conveyed to said Henry W. Peery said land or any part thereof:" *held,* that there was nothing about

EQUITY—(*Continued.*)

the denial in the nature of a negative pregnant, nor was there any such ambiguity about it as to render it bad pleading under the present system; and that the construction given to the pleadings by the court in causing the answer to be stricken out was, in violation of Gen. Stat. 1865, p. 661, § 37, strict and technical, and was unwarranted.— *Id.*

ESTOPPELS.

See CONTRACTS, 1. EQUITY, 4, 9. JUSTICES' COURTS, 2.

EVIDENCE.

1. *Wills — Probate of — Evidence concerning.*— The certificate of probate granted by the clerk of the County Court is not conclusive either for or against the admission of the will to probate; and without an order made by the County Court, at its next term thereafter, confirming his act, it would constitute no sufficient evidence that the will had been duly admitted to probate. The probate of a will is a judicial act, the best evidence of which is the order of the court confirming the act of the clerk, and it is only to be ascertained by the records of that tribunal. But when recorded in the manner required by law, with the proof of its execution indorsed upon it and certified by the clerk, it may be inferred that the order of the County Court admitting it to probate had been made, although no certificate of such fact was attached to the copy produced in evidence.— Creasy v. Alverson, 13.
2. *Wills — Devise of lands — Mistake in description — Extrinsic evidence.*— Where a devised tract of land was described in the will as "the west half of the northeast quarter of section thirty-three, township sixty, of range six, containing eighty acres, and situated in the county of Marion," but this description showed that such a tract could not be located in that county, extrinsic evidence might properly be introduced to show that the west half of the northeast quarter of section *three*, in township *fifty-nine*, range six, was owned and claimed by the testator; that it was in Marion county, and adjoined another tract devised to the same son, while the tract described in the will was really in the county of Lewis, and owned and occupied by a different person altogether; and further, that the tract was improperly described in the will by a mistake of the person who drew it up.—*Id.*
3. *Common Carriers — Evidence — Way-bill — Manifest.*—Action was brought to recover the value of three boxes of goods shipped at St. Louis, on board of one of defendant's boats, to be delivered at the city of Leavenworth. These boxes were included in the bill of lading, and shipped, but not included in the receipt given at the point of destination. The court properly excluded a way-bill on the Hannibal and St. Joseph railroad, and the manifest of a steamboat plying between points on the line over which the goods had to pass, offered to explain the discrepancy between the receipt and the bill of lading.—Erb v. Keokuk Packet Company, 53.
4. *Land, value of — Evidence — Opinion of Witness.*— The opinions of property-holders residing in the neighborhood where land is situated are admissible evidence as to its value.—Thomas v. Mallinckrodt, 58.
5. *Practice, Civil — Evidence — Letters — Copies, where admissible.*—Where a party to a suit failed to produce certain letters in response to a notice so to do, and there was sufficient proof that they had been deposited in the post-office and directed to the proper address, the presumption that they

EVIDENCE—(*Continued.*)

had been received by due course of mail would, perhaps, be sufficiently strong to authorize the reading in evidence of copies. But in the absence of positive and satisfactory proof of that fact, there would be no error in excluding them.—Phillips v. Scott, 86 (89).

6. *Agency—Consignment—Factor, sales by—Place of, how fixed.*—Where a consignment is made to a factor for sale, unaccompanied with instructions from the principal, and in the absence of an established usage of trade to the contrary, it may be presumed that the produce is intended to be sold at the residence of the factor. The intent of the principal, which, in such cases, is to be gathered from the circumstances, alone fixes the character of the contract between the parties as to the place of sale, and the factor is not at liberty to disregard it.—*Id.* (91.)

7. *Agency—Consignee, shipment of produce to other markets by; when authorized—Usage of trade.*—A consignee residing in St. Louis has no authority, merely by virtue of the consignment, to ship produce to another market for sale. Where evidence tends to prove the existence of a usage of trade which authorized commission merchants in St. Louis, in their discretion, to ship produce to other markets, an instruction to that effect might be given to the jury; but such usage, to be of any avail, ought to be so general and well established that it might, for that reason, be presumed to have entered into the contract, or that it had actually been brought home to the knowledge of the principal.—*Id.* (90, 92.)

8. *Agency—Evidence—Authority to receive lands on behalf of a bank in payment of debts, how shown.*—The authority of an attorney in fact of a bank to receive lands in satisfaction of drafts held by the bank may be shown, without proof of his appointment by a resolution or by-law of the board of directors. It may be inferred from the acts and conduct of the parties. And where the subsequent holder of the drafts accepted a transfer of the lands given in satisfaction thereof, and sold the lands under judicial proceedings against a prior indorser to foreclose his right to redeem them, and received the proceeds of the sale, such acts are amply sufficient to show a ratification by the holder of the authority of the agent. And he cannot repudiate such an agreement between the drawer and agent of the bank, even when made without his full knowledge and consent, and bring suit against the drawer for the remainder of the drafts unsatisfied by the sale of the lands, unless the drawer be placed in as good a situation as when the lots were conveyed to the agent.—Norton v. Bull, 113.

9. *Evidence—Stale claim—Proof of solvency, showing payment of.*—Testimony of defendant touching his solvency would be admissible as tending to prove the payment of a stale claim, where the question of payment is in issue; but not simply for the purpose of showing that nothing was due from himself to plaintiffs, where the amount sued for is admitted to have been unpaid.—Church v. Fagin, 123.

10. *Insanity—Presumptions—Burden of proof.*—The question of insanity is always one of fact. Every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crime, until the contrary is shown; and to establish insanity as a defense it must be proved that at the time of committing the offense the defendant was laboring under such a

EVIDENCE—(*Continued.*)
defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, such as not to know that he was doing wrong. The burden of establishing the insanity of the accused affirmatively to the satisfaction of the jury rests upon the defense.—State v. Klinger, 127.

11. *Insanity — Degree of proof required.*— It is not necessary that the defense of insanity be established beyond a reasonable doubt; it is sufficient if the jury is reasonably satisfied, by the weight or preponderance of the evidence, that the accused was insane at the time of the commission of the act.— *Id.*

12. *Replevin — Evidence — Naked possession — Title.*—Where plaintiff's title is denied, naked possession is not sufficient to maintain an action for the claim and delivery of personal property. The plaintiff must prove that he had a general or special property in the thing sought to be recovered.— Gartside v. Nixon, 138.

13. *Limitations —Adverse possession, what proof of required.*—In an action of ejectment it is not necessary to the success of a defense under the statute of limitations that the adverse character of defendants' possession should be brought home to the actual knowledge of plaintiff by affirmative proof. If the defendants' possession be adverse to all others, open and notorious, and held by them under claim of title, it is sufficient in its character, whether plaintiff knew the facts or not.— Scruggs v. Scruggs, 142.

14. *Joint trespassers —Evidence —Complicity.*—Any person who is present at the commission of a trespass, encouraging or exciting the same by words, gestures, looks, or signs, or who in any way, or by any means, countenances or approves the same, is in law deemed to be an aider and abettor, and liable as a principal; and proof that a person is present at the commission of a trespass, without disapproving or opposing it, is evidence from which, in connection with other circumstances, it is competent for the jury to infer that he assented thereto, lent to it his countenance and approval, and was thereby aiding and abetting the same.— McMannus v. Lee, 206.

15. *Evidence —Contract —Parol agreement.*— It is a general rule that extrinsic evidence cannot be admitted to contradict, add to, subtract from, or vary a written contract. Parties may, by a subsequent parol agreement, upon a sufficient consideration, change the mode of payment or other terms of their written contract, or they may discard it altogether; and it makes no difference how soon after the execution of the written contract the parol one was made, if, in fact, it was subsequent, and not otherwise objectionable. But (where the written agreement was neither incomplete nor uncertain in its terms) the parol contract, to be admissible, must be independent, and not explanatory or contradictory, of the written one.—Bunce, Adm'r, v. Beck, 266.

16. *Sales — Declarations of by-standers.*— The declarations of by-standers at a public sale are proper to be received in evidence, not only because they form a part of the *res gestæ* which show how the purchasers' professions had affected the bidding, but also because the slightest circumstances are admissible in questions of fraud.— Stewart v. Severance, 322.

17. *Revenue — Evidence — Tax books, certified copies of.*—Where a witness testified, without objection, to the assessment and amount of city, State, and county taxes, and to the payment of them by himself, and there was no countervailing proof in regard to the assessment and amount of taxes, the evidence

EVIDENCE—(*Continued.*)

was sufficient to prove the existence of the taxes, without a resort to the certified copies of the tax books.—Blumenthal v. Mugge, 427.

18. *Witnesses — Leading questions in direct examination — Discretion of court touching.*— When and under what circumstances leading questions are permissible on a direct examination rests in the sound discretion of the court trying the cause to determine, and its decision is not assignable for error.—Meyer v. People's Railway Company, 523.

19. *Practice, Civil—New trial on ground of mistake or perjury of witness, when granted.*— The granting of a new trial in cases of perjury or mistake by a witness rests in the sound discretion of the Circuit Court, and it would require a case of the grossest character to authorize the Supreme Court to interfere.—Jaccard v. Davis, 535.

20. *Practice—New trial on ground of newly-discovered evidence designed to impeach former witness not granted.*—It is well settled that a new trial will not be granted on the ground of newly-discovered evidence which is simply intended to impeach or contradict the testimony of a witness at the original trial.—*Id.*

21. *Evidence — Witnesses — Opinions— Rebuttal.*—Witnesses should not give their opinions upon the truth of a statement by another witness, though they may do the same thing in effect by denying the fact stated.—Holliman v. Cabanne, 568.

22. *Attorney at law — Privileged communications — Deeds and notes.*— An attorney at law cannot be called upon to testify respecting the condition and appearance of a deed of trust and the trust notes at the time when they were committed to him to bring suit of foreclosure upon. That the communications to the attorney were made in the form of deeds or notes, does not exclude them from the protection of the statute and the general principle affecting privileged communications.— Gray v. Fox, 570.

See ARBITRATION AND AWARD, 1. CONTRACTS, 2. HUSBAND AND WIFE, 3, 4. INSURANCE, 5. LAND TITLES, 1. MANDAMUS, 1. PRACTICE, CIVIL, 9. PRACTICE, CRIMINAL, 5. PRACTICE, SUPREME COURT, 1, 2. ST. LOUIS, CITY OF, 13. SALES, 2.

EXECUTIONS.

1. *Justice's Court — Appeal — Transcript — Execution — Hannibal Court of Common Pleas.*— The filing of a transcript from a justice's court in the office of the clerk of the Circuit Court of Marion county was, by the act establishing the Hannibal Court of Common Pleas, made a condition precedent to the authority of the latter court to issue an execution thereon. (Carr v. Youse, 39 Mo. 346, affirmed.)— Carr v. Youse, 28.

2. *Contract—Sale—Levy—Estoppel.*— If, after an alleged purchase of goods, the vendees caused an execution to be levied on them as the property of the vendor, this was a solemn admission on their part that the goods were, at the time of the levy, the property of the vendor; and they are estopped from claiming the goods in any other way than by virtue of said levy, even although the evidence showed they did not intend by such levy to abandon their alleged purchase, and acted under advice from counsel that their title to the property would not be affected thereby.— Field v. Langsdorf, 32.

3. *Practice, Civil — Execution, irregularities in — Purchasers at, notice to — Non-appearance of parties.*—If a party who is properly in court and has

EXECUTIONS—(*Continued.*)

knowledge of the process desires to set aside an execution sale for error or causes not appearing of record, he must act at the return term of the execution. After, by his silence, he has suffered the sheriff to deed the property, and the rights of third parties have intervened, his acquiescence is presumed. But if the proceedings in obtaining the judgment or in effecting the sale be irregular, the purchaser buys with notice thereof. Nor does the rule apply where there is no actual appearance of the party, and where the proceedings are without his knowledge.—Downing v. Still, Adm'r, 309.

4. *Execution—Sale, irregularities of sheriff in, may be set aside.*—Even if the proceedings in obtaining judgment were regular, or, being irregular, it were held that the plaintiff could not disturb them, yet if the execution sale were irregular, and the irregularity were alone on the part of the sheriff, the sale should be set aside.—*Id.*

5. *Execution—Judgment—Mistake of clerk in describing date of in execution.* Where an execution recited that it was in pursuance of a judgment rendered on the 13th day of September, 1860, when the judgment on which the execution was actually issued was rendered on the day preceding: *held*, that such mistake of the clerk in describing the judgment did not invalidate the sale and annul the proceedings.—Stewart v. Severance, 322.

6. *Execution—Actions not founded on record—Variance in execution.*—Where a matter of fact is the foundation of the action, and matter of record is only the inducement thereto, a variance in the execution in the description of the record is not material, unless so great as to amount to a strong probability that the record cannot be the writing described.—*Id.*

7. *Execution—Variance—Misprision of clerk.*—Where the variance between the judgment and the execution is owing to the misprision of the clerk, and is merely formal, the variance is amendable and may be disregarded by the court. But where there was not simply a mistake or error, but a total non-compliance with the statute, the rule is otherwise.—*Id.*

8. *Execution—Sale of land at third term from date of, of what force—Construction of statute.*—Where an execution was made returnable to the June term, 1864, and certain land was levied upon in the meantime, but by order of plaintiff no sale was made at the June or September term, but at the December term the same was sold under the original execution, without any new levy, the execution merely reciting the previous levy: *held*, that under the act of 1863 (Sess. Acts 1863, p. 20) the execution continued in force, and the sale was valid.—*Id.*

9. *Execution sale—Conspiracy to depress bidding.*—Defendants have the unquestioned right to agree among themselves that at the execution sale they will bid an amount sufficient to save themselves harmless from liability, and the sale should stand, notwithstanding it may have inured greatly to their benefit, unless it be shown that there was a conspiracy to depress the bidding.—*Id.*

10. *Fraud—Burden of proof—Judicial sales—Collusion.*—It is incumbent on the party alleging fraud to prove it; but every circumstance conducing to show its existence is admissible. Courts, from considerations of policy, are inclined to uphold judicial sales, but this policy will not go so far as to sustain them where they have been conducted with bad faith and collusion.—*Id.*

11. *Execution—Sale—Purchaser—False representations.*—If the purchaser

EXECUTIONS—(*Continued.*)

at an execution sale falsely appeal to the benevolence of the bidders by giving out that he is buying for the benefit of the debtor or his family, this will be a circumstance which, in conjunction with slight evidence, may be sufficient to justify a court in setting aside a sale as fraudulent. The same effect would follow when the declarations were made privately, and persons who would otherwise have attended for the purpose of purchasing are kept away in consequence thereof. But it would be necessary to show by some evidence that this result followed.—*Id.*

12. *Sales—Declarations of by-standers.*—The declarations of by-standers at a public sale are proper to be received in evidence, not only because they form a part of the *res gestæ* which show how the purchasers' professions had affected the bidding, but also because the slightest circumstances are admissible in questions of fraud.—*Id.*

13. *Execution, when it will protect the officer making the levy.*—If the court has no jurisdiction over the subject matter, the officer making the levy is supposed to know it, and an execution issued upon a judgment in such case is no protection to him. It is his duty to refuse to serve it. But if the court has jurisdiction of the subject matter, and has only failed to obtain jurisdiction of the person, an execution will protect the officer, provided this failure does not appear upon the process in his hands. He is not presumed to know of the regularity or legality of the judgment. If the court has power to render such a judgment, and nothing appears against its validity, it would be a great hardship to hold him responsible for the errors of the court.—Howard v. Clark, 344.

F

FIXTURES.

1. *Contract—Fixtures—Permission to occupy land of another, effect of.*—A building or other fixture which is ordinarily a part of the realty is held to be personal property when placed on the land of another by contract or consent of the owner; and it need not be a trade fixture.—Hines v. Ament, 298.

See LANDLORD AND TENANT, 3.

FRAUDS AND PERJURIES.

1. *Fraud—Burden of proof—Judicial sales—Collusion.*—It is incumbent on the party alleging fraud to prove it; but every circumstance conducing to show its existence is admissible. Courts, from considerations of policy, are inclined to uphold judicial sales, but this policy will not go so far as to sustain them where they have been conducted with bad faith and collusion.—Stewart v. Severance, 322.

2. *Execution—Sale—Purchaser—False representations.*—If the purchaser at an execution sale falsely appeal to the benevolence of the bidders by giving out that he is buying for the benefit of the debtor or his family, this will be a circumstance which, in conjunction with slight evidence, may be sufficient to justify a court in setting aside a sale as fraudulent. The same effect would follow when the declarations were made privately, and persons who would otherwise have attended for the purpose of purchasing are kept away in consequence thereof. But it would be necessary to show by some evidence that this result followed.—*Id.*

FRAUDS AND PERJURIES—(*Continued.*)

3. *Equity — Action to set aside conveyance of land on ground of fraud, what circumstances warrant.* — In an action to annul the conveyance of certain lots of land, given in exchange for certain shares of stock, on the ground that the conveyances were obtained through false and fraudulent representations and suppressions touching the financial standing, condition, and prospects of the company, and the value of its stock: *held*, that a court will not rescind such a contract without the clearest proof of the fraudulent misrepresentations, and that they were made under such circumstances as show that the contract was founded upon them.— Bryan v. Hitchcock, 527.

See CONTRACTS, 7. INSURANCE, 7. SALES, 3.

G

GARNISHMENT.

See ATTACHMENT.

H

HOUSE OF REPRESENTATIVES.

See OFFICERS.

HUSBAND AND WIFE.

1. *Husband and Wife — Right of wife to her separate earnings.* — When a husband permits a wife to carry on business on her sole and separate account, all that she earns will be deemed to be her separate property, and disposable by her as such, subject to the claims of third persons properly affected by it. — Coughlin v. Ryan's Adm'r, 99.
2. *Husband and Wife — Proceeds of leasehold estates held by wife, how treated.* — Where the wife held certain leasehold estates, partly owned by her prior to marriage, and partly purchased afterward with money not derived from her husband, and was suffered by him, during the whole period of her coverture, in her own name, to pay taxes and ground rent of the leaseholds, and collect and deposit moneys derived therefrom, such proceeds must be treated as her separate property, accumulated by her own efforts, with the consent of her husband; and in event of her death without children, he will not be permitted to retain it as against her separate heirs.— *Id.*
3. *St. Louis Court of Criminal Correction — Abandonment of wife by husband, action for — Witness, wife may be.* — In case of proceedings in the St. Louis Court of Criminal Correction, based on the act of 1867 (Sess. Acts 1867, p. 112), by the wife against the husband, for abandonment, without providing her with the means of support: *held*, that she was a competent witness to testify to the fact of abandonment and its attendant circumstances, and competent to verify the complaint which recited and set out the facts.— State v. Newberry, 429.
4. *Husband and Wife, when witnesses for or against each other—Injuries committed by husband upon wife, action for.*—As a rule, the husband and wife are not allowed to testify for or against each other. But there are exceptions to the rule as well established as the rule itself. Among these exceptions are included all cases of personal injury to the wife committed by the husband.

HUSBAND AND WIFE—(*Continued.*)

In such cases the wife is permitted to testify against the husband, on the principle of necessity. The wife is the party having the best means of knowledge, and may be the only person capable of establishing the facts in proof.— *Id.*

See DIVORCE.

I

INFANTS.

1. *Infants — Parent not responsible for trespasses of.*—A parent cannot be held liable for the willful trespasses and torts of his infant children, when he neither assents to nor ratifies them.— Paul v. Hummel, 119.
2. *Infants, liability of, for torts.*—Where a minor has committed a tort, with force, he is liable, at any age, to be proceeded against like an adult.— *Id.*

INDORSEMENT.

See BILLS AND NOTES.

INJUNCTION.

See LANDLORD AND TENANT, 3. PRACTICE, CIVIL — ACTIONS, 4, 5.

INSANITY.

See EVIDENCE, 10, 11.

INSTRUCTIONS.

See PRACTICE, CIVIL — TRIALS. PRACTICE, SUPREME COURT.

INSURANCE.

1. *Insurance, Fire — Application — False representations and warranties — Agency.*—Where an action on a fire-insurance policy was resisted on the ground of false representations and warranties, in that the application of plaintiffs stated their title to the insured property to be an unencumbered fee simple, whereas it was in fact only an encumbered equitable title, testimony was competent showing that plaintiffs, before their application was drawn up, submitted to the inspection of the agent of the insurance company their title paper, being a bond for a deed on which a balance of one hundred dollars was then unpaid, and that the agent thereupon filled up the application in his own language, saying that it was "all right;" and that they, believing it to be so, signed the application without being aware of its peculiar phraseology, or that the answers "fee simple" and "no encumbrances" were in it. In this case, the acts of the agent were the acts of the company, and his knowledge was theirs. And having taken the risks under such circumstances, knowing the facts, they cannot come in, after a loss has occurred, and avoid the policy by disproving the truth of their own statements, as contained in the application.— Combs v. Hannibal Savings and Insurance Company, 148.
2. *Insurance, Fire — Application filled up by agent, how treated.*— Such statements respecting plaintiffs' title, so inserted in the application for insurance, may be regarded as an expression of the opinion of the parties as to the practical result of plaintiffs' title bond, and of a mutual understanding and agreement between them to consider and treat the title as a fee simple or its equivalent for the purpose of the insurance contract.— *Id.*
3. *Insurance Companies — Agent — Authority.*— The authority of the soliciting agent of an insurance company to take applications for insurance carries with it the legal implication of authority to fill up the application and do all those things which may be needful in perfecting it.— *Id.*

INSURANCE—(*Continued.*)

4. *Insurance, Fire—Policy—Title of assignee to, how affected by antecedent equities.*—The assignee of a mutual insurance policy obtains a title wholly derivative, and he can have no greater rights than the assured. Where the assignment was made after the loss occurred, it gave the assignee an equitable interest and right to recover, subject to set-off against the assignor, such as an assessment made by the company on the premium note of the assignor, and all other equities.—Archer v. Merch. and Manuf. Ins. Co., 434.

5. *Insurance, Fire—Materials, hazardous and extra hazardous, covered by policy, when.*—Defendant issued a policy of insurance upon a wagon-maker's shop, the property of plaintiff. By the conditions of the policy the company were not to be liable for damages resulting from "explosions caused by gunpowder, gas, or other explosive substances, nor for damages occasioned by the use of camphene, spirit gas, or burning fluid, unless otherwise expressly provided." In the building insured was a shop containing paints and a half barrel of benzine, which caught fire and caused the burning of the property. *Held*, that though the paints and benzine, disconnected and by themselves, would belong to the class excluded by the terms of the policy, yet, as it was proved that they were materials usual and customary in the manufacture of wagons, and generally kept in the same shop where wagons were made, they were covered by the terms of the policy, and evidence going to such proof was admissible.—*Id.*

6. *Insurance—Contract of indemnity—Indorsement on, to pay insurance to third party, effect of.*—A contract of insurance is a contract of indemnity; and to entitle a party to recover for a loss he must generally have an interest in the premises or the property destroyed. And where an insurance company issued a policy to A., with the indorsement thereon that the loss, if any, should be paid to B., it was an admission by the company that B. had an interest in the contract, and was to receive the benefit of it.—Franklin v. National Insurance Company, 491.

7. *Insurance, Fire, action upon—Over-insurance—Forfeiture of policy, clause of, how construed.*—In general, a previous or subsequent insurance without notice—in case of a policy requiring such notice, and with a clause forfeiting the policy in default of such notice—discharges the obligation of the insurance company. Such concealment is a fraud upon the company. And in an action on the policy, the insured will not be permitted to show that there was no fraud in fact, or even that the insurer, when the loss is less than the policy, is benefited by the over-insurance, by being required only to make contribution instead of paying the stipulated sum. But if a second policy, against which the contract stipulates, is itself a void one, or one that cannot be enforced, it will not avoid the first, notwithstanding the clause of forfeiture. The construction given to such covenants accords with their object—to take away from the assured any motive to destroy his property or to be lax in saving it.—Obermeyer v. Globe Mutual Insurance Company, 573.

8. *Insurance, Fire—Over-insurance—Policies, to avoid the one sued on, should exist at time of loss.*—To constitute a successful defense to an action on an insurance policy, it should appear that the policies relied upon to avoid the one containing the covenant of forfeiture existed and were in force at the time of the loss.—*Id.*

9. *Insurance, Fire—Clauses of forfeiture—Concealment of over-insurance at*

INSURANCE—(*Continued.*)

date of policy and afterward.—In determining the effect of clauses of forfeiture in policies of insurance, there is an obvious distinction between a concealment or false statement of facts existing at the commencement of the risk and a neglect of duty in regard to a matter occurring afterward. In the one case the policy never takes effect, the risk is never assumed, while in the other it is only interrupted.—*Id.*

10. *Insurance, Fire—Policy, action on—Over-insurance—Intention of assured—Amount of insurance at date of loss.*—In an action on a policy of insurance, where it appeared that the assured intended to comply literally with the stipulations of his contract forfeiting his policy in case of over-insurance, but that, having been notified that one of his policies would be canceled at a certain time, he procured another insurance of an equal amount, and it turned out afterward that the policy was not canceled until about a month after the last insurance had been effected, thus making an over-insurance for a period terminating more than two months before the loss: *held*, that such a violation of the policy did not discharge the defendant.—*Id.*

J

JUDGMENTS.

1. *Foreign judgments—Jurisdiction of courts of sister States—Territorial limitation.*—To give a court jurisdiction, a real defendant, against whom the plaintiff is entitled to a judgment, must be found and served with process within the limits of its jurisdiction, or some property or chose in action must be found there against which the court can proceed *in rem.* Every attempt on the part of one nation or State, by its Legislature, to grant jurisdiction to its courts over persons or property not within its territory, is regarded elsewhere as mere usurpation; and all judicial proceedings in virtue thereof are held utterly void.—Latimer v. Union Pacific Railway, E. D., 105.
2. *Foreign judgments—Jurisdiction of courts of sister States—Proceedings in rem.*—To enforce any right of action against property, real or personal, it must be within the jurisdiction or possession of the tribunal assuming to give judgment against it.—*Id.*
3. *Foreign judgments—Jurisdiction of courts of sister States—Notice by publication.*—A personal judgment obtained in a sister State, upon notice to the defendant by publication only, there being no appearance of defendant, will be deemed null and void outside the State in which it was rendered, and will support no action here.—*Id.*
4. *Foreign judgments—Courts of sister States—Personal service upon non-residents temporarily within territorial jurisdiction of.*—Service of summons upon an officer of a foreign corporation, who happens to be temporarily in another State, and who does not voluntarily appear to the action, does not give the court of that State jurisdiction for the purpose of rendering personal judgment upon contracts made in that State, or for debts due to residents thereof.—*Id.*
5. *Practice, Civil—Judgment, irregularity of, when may be set aside.*—In general a court will not correct or set aside its judgments except at the term when they are rendered. But, under the authorities and the statute

JUDGMENTS—(*Continued.*)

(Gen. Stat. 1865, ch. 172, § 26), a judgment may be set aside for irregularity at any subsequent term within three years from its rendition.—Downing v. Still, Adm'r, 309.

6. *Practice, Civil—Judgment for plaintiff, when set aside.*—A party who is injured by a judgment is entitled to relief by the usual modes, whether the form of the judgment be for him or against him. The usual proceeding against irregularities is by motion. When such motion will lie he should not be driven to a higher court, but the tribunal where the wrong was done should furnish the relief, even where the judgment was in his favor. Where it was apparent that judgment in favor of plaintiff was rendered at his instance, with knowledge on his part of its irregularity, he should, perhaps, in punishment of his fraud, be left to make what he could out of his invalid judgment; but his knowledge of such irregularity should be made to appear clearly.—*Id.*

7. *Practice, Civil—Voluntary judgment, by which plaintiff is defrauded of his rights, set aside, how.*—A party in whose favor a voluntary judgment has been entered, but so loosely and irregularly as to defraud him of his rights, may have the judgment set aside; and the proper proceeding for that purpose is by motion, and not by a bill in equity.—*Id.*

8. *Practice—Service, time of—Judgment, when void.*—A judgment by default, rendered upon service within the time the law prescribes, is void.—Howard v. Clark, 344.

9. *Mortgage, foreclosure of—Judgment over, personally, against defendant, a statutory judgment.*—Where the petition for the foreclosure of a mortgage, which prayed that, if the mortgaged premises were insufficient to satisfy the mortgage debt, judgment over might be rendered personally against the debtor, and judgment rendered thereupon awarded execution, in case the mortgaged premises should be insufficient to satisfy the debt, "against the other goods, chattels, lands, and tenements" of defendant: *held*, that such prayer and judgment showed the proceedings foreclosing the mortgage to be under the statute, and not in equity.—Fithian v. Monks, 502.

10. *Mortgage—Assumption of mortgage by vendee of mortgagor—Judgment against vendee, effect of.*—In case of sale of the mortgaged property to a third party, even though the vendee expressly assumes, as a part of the consideration of the purchase, to pay off the amount of the mortgage, judgment for a residue of the debt unsatisfied by the mortgage estate cannot be rendered against him personally in this State. The equity doctrine that such a contract of the vendee with the mortgagor amounts to an additional security taken by the latter, and inures to the benefit of the mortgagee by equitable subrogation, cannot hold under the laws of Missouri. (R. C. 1855, ch. 113, § 11.) Such vendee is in no sense a mortgagor, either by subrogation or otherwise. As the proceeding for foreclosure in such case is purely statutory, the remedy cannot be extended beyond its provisions, and it authorizes in no instance a personal judgment over for the residue, where a deficiency occurs, except in the case of the mortgagor.—*Id.*

11. *Judgments, value of, when proceedings are coram non judice—Erroneous judgments, value of.*—Where there is no authority in a court to act—where its proceedings are *coram non judice*—then they are null and void; and, in case of judgments rendered thereon, no title passes by virtue of the execution. And if a judgment is void, advantage can be taken of it in any collateral proceed-

JUDGMENTS—(*Continued.*)

ing. But whenever it appears that a court possessing judicial powers has rightfully obtained jurisdiction of a cause, all its subsequent proceedings are valid, however erroneous they may be, until they are reversed on error or set aside by some direct proceedings for that purpose. A judgment in proceedings to foreclose a mortgage, rendered against the mortgagor and his vendee, who had assumed, as part consideration of the purchase, to pay off the encumbrance, so far as it affected the vendee personally or his separate estate not included in the mortgage, was not merely erroneous, or voidable and reversible on error, but was an absolute nullity, and no title passed by a sale of his estate under the judgment.—*Id.*

See CONVEYANCES, 1. EXECUTIONS, 5, 7, 8. PRACTICE, CIVIL—APPEALS, 4. PRACTICE, CIVIL—TRIALS, 1.

JURISDICTION.

1. *Foreign judgments—Jurisdiction of courts of sister States—Territorial limitation.*—To give a court jurisdiction, a real defendant, against whom the plaintiff is entitled to a judgment, must be found and served with process within the limits of its jurisdiction, or some property or chose in action must be found there against which the court can proceed *in rem.* Every attempt on the part of one nation or State, by its Legislature, to grant jurisdiction to its courts over persons or property not within its territory, is regarded elsewhere as mere usurpation; and all judicial proceedings in virtue thereof are held utterly void.—Latimer v. Union Pacific Railway, E. D., 105.
2. *Foreign judgments—Jurisdiction of courts of sister States—Proceedings in rem.*—To enforce any right of action against property, real or personal, it must be within the jurisdiction or possession of the tribunal assuming to give judgment against it.—*Id.*
3. *Foreign judgments—Jurisdiction of courts of sister States—Notice by publication.*—A personal judgment obtained in a sister State, upon notice to the defendant by publication only, there being no appearance of defendant, will be deemed null and void outside the State in which it was rendered, and will support no action here.—*Id.*
4. *Foreign judgments—Courts of sister States—Personal service upon non-residents temporarily within territorial jurisdiction of.*—Service of summons upon an officer of a foreign corporation, who happens to be temporarily in another State, and who does not voluntarily appear to the action, does not give the court of that State jurisdiction for the purpose of rendering personal judgment upon contracts made in that State, or for debts due to residents thereof.—*Id.*
5. *Jurisdiction—Probate and Common Pleas Court of Greene County—Construction of statute.*—The apparent design of the thirteenth section of the act establishing a Court of Probate and Common Pleas in Greene county (Local Acts 1855, p. 59) was to provide the means of trying causes, where the judge of the Circuit Court was unable to do so because of disqualification, without sending them out of the county for that purpose. The term "any cause," contained in that section, is broad enough, at least, to embrace any civil cause; and such construction of it is in accordance with the apparent intent of the enactment.—Logan v. Small, 234.
6. *Justices of the Peace in Buchanan county—Jurisdiction.*—The special act of March 23, 1863, gives justices in Buchanan county concurrent jurisdiction

JURISDICTION—(*Continued.*)

with the Circuit Court, upon notes and bonds, under $250, for the payment of money. This act has never been expressly repealed. Nor is it repealed by or repugnant to the provisions of the General Statutes, but is recognized as in force by section 6, chapter 224, of said statutes.—Howard v. Clark, 344.

7. *Practice, Civil—Courts—Jurisdiction, how acquired—Service of process.*—Jurisdiction over the party is acquired when the person is actually and personally served with process within the territorial limits of jurisdiction, or where he appears and, by his pleadings, admits the jurisdiction. Jurisdiction of the cause is the power over the subject matter given by the laws of the sovereignty in which the tribunal exists.—Fithian v. Monks, 502.

See JUSTICES' COURTS, 5. MANDAMUS, 2. RAILROADS, 1.

JUSTICES' COURTS.

1. *Justices' Courts, practice in—Power of justice to set aside non-suit.*—Where a justice of the peace, after hearing of testimony in a trial where both parties were present, on motion of defendant non-suited plaintiff, and afterward, at the instance of plaintiff, set the non-suit aside and granted a new trial, such action in setting aside the non-suit was no cause for reversing a judgment subsequently rendered in favor of plaintiff in the Circuit Court. Justices of the peace have no power to set aside non-suits, except where they are rendered for non-appearance. But neither have they power to render an involuntary non-suit when a jury has been impaneled in the case.—Fortier v. Ball, 23.

2. *Justices' Courts—Non-suit—Appeal—Estoppel.*—Where defendant, after procuring non-suit, appeared before the justice at a second trial, and upon appeal to the Circuit Court had another trial, without complaining, he will not afterward be permitted in the District Court to set up the judgment of non-suit as a bar to the plaintiff's right to recover.—*Id.*

3. *Justice's Court—Appeal—Transcript—Execution—Hannibal Court of Common Pleas.*—The filing of a transcript from a justice's court in the office of the clerk of the Circuit Court of Marion county was, by the act establishing the Hannibal Court of Common Pleas, made a condition precedent to the authority of the latter court to issue an execution thereon. (Carr v. Youse, 39 Mo. 346, affirmed.)—Carr v. Youse, 28.

4. *Justices' Courts—Appeal, what cause of action tried upon.*—Where an action of damages against a railroad company was originally brought before a justice of the peace, under the common law, for negligence in killing stock, and on appeal to the Circuit Court an amended statement was filed under the provisions of section 5, ch. 51, R. C. 1855: *held*, that the whole cause of action was changed, and, under the statute concerning appeals from justices of the peace, the same was properly stricken out on motion.—Hansberger v. Pacific Railroad Company, 196.

5. *Justices' Courts—Venue—Jurisdiction.*—When a justice's court proceeded under an act which declared that all suits brought thereunder should be tried in the township where the injury complained of was committed, that fact should appear on the face of the papers, in order to confer jurisdiction.—*Id.*

6. *Justices of the Peace in Buchanan county—Jurisdiction.*—The special act of March 23, 1863, gives justices in Buchanan county concurrent jurisdiction with the Circuit Court, upon notes and bonds, under $250, for the payment

JUSTICES' COURTS—(*Continued.*)
of money. This act has never been expressly repealed. Nor is it repealed by or repugnant to the provisions of the General Statutes, but is recognized as in force by section 6, chapter 224, of said statutes.—Howard v. Clark, 344.

L

LAND TITLES.
1. *Land Titles — Ejectment — Prior possession with claim of the fee — Presumptions.*—It is well settled that prior possession, accompanied by a claim of the fee, raises a presumption of title and is sufficient to support the right to eject him who has only the naked possession; and the grantee of the person so holding prior possession succeeds to his title and rights.—Dale v. Faivre, 556.

LANDLORD AND TENANT.
1. *Landlord and Tenant — Use and occupation, action of.*—The action for use and occupation cannot be maintained, unless the relation of landlord and tenant, express or implied, exists between the parties.—Edmonson v. Kite, 176.
2. *Landlord and Tenant — Use and occupation, action of — Trespasser.*—A trespasser cannot be sued for use and occupation, nor can the landlord waive the tort and proceed against him as a tenant.—*Id.*
3. *Landlord and Tenant — Fixtures, removal of by outgoing tenant — Injunction — Dissolution — Sale of property by landlord — Damages* — Erections placed by a tenant on the leasehold premises for the more beneficial enjoyment of the same may be removed prior to the expiration of his term of lease, unless the removal would leave the inheritance in a worse condition than when he took possession. And if before the expiration of the lease the landlord prevented their removal by injunction proceedings, upon dissolution thereof the tenant is entitled to a reasonable time within which to remove them. And where, pending the ultimate determination of the injunction suit, the landlord had made a deed conveying to a *bona fide* purchaser, without notice, the land, "together with the rights, immunities, privileges, and appurtenances thereunto belonging," the improvements, as between the landlord and tenant, continued to be the personal property of the latter, however the case might be as regards the purchaser. The sale of the improvements by the landlord, and the application of the proceeds to his own use, was a conversion of them, and entitles the lessee to compensation in damages. And the deed from the landlord may be properly read in evidence as tending to show such conversion, and is sufficient for that purpose.—Bircher v. Parker, 443.
4. *Landlord and Tenant — Leases and under-leases — Surrender of leasehold by implication—Forfeitures—Terms in law and equity.*—A. leased certain premises to the trustee of B. for sixteen years. B. underlet them to C. for three years. Afterward an arrangement was effected between A., B., and C., by which, in order to cancel a debt from B. to C., A. was to give C. the lease of the premises for two and a half years, on the same terms as those of B.'s lease; at the expiration of which time B. was to have possession under the original lease. C. held over after his term, and succeeded in procuring from the representatives of A. a lease for the remainder of B.'s sixteen-years' leasehold: *Held*, that the consent of B. to the two-and-a-half-years' lease to C. was not a surrender of her original leasehold, but that the new leasehold, being made for her use, was a clear recognition of her rights under the old one. A

LANDLORD AND TENANT—(*Continued.*)

surrender by implication must be in conformity with the intention of the parties. A surrender will not be implied when it is obvious that the second lease was intended to be beneficial, and that the lessee was not to lose any of the rights that he possessed. A. had no right, without the consent of B., to give the lease to C. for the remainder of the sixteen years. In holding over his term he elected, so far as he had power to elect, to continue in possession under the conditions of his lease. By paying ground rent he saved the original lease from forfeiture, and rendered any subsequent attempt to forfeit it a fraudulent sham. The claim of B. was good for her full term, and C. had no rights under his lease as against her.—Thomas, Trustee, v. Zumbalen, 471.

5. *Landlord and Tenant—Tenant holding over—Rent, what payable.*—Ordinarily, the measure of the obligations by way of rent of a tenant holding over is the terms of his lease. But if a higher rent is demanded, or if it is clear that there is no implied consent to his remaining on those terms, the rule will not apply. He certainly, as the wrong-doer, cannot consent to its application, but the landlord may. Where, at the expiration of his term, proceedings were instituted at once to oust the tenant, he should be held to pay all the premises were worth, less ground rent and taxes, after the expiration of his term.—*Id.*

LEASE.

See CONTRACTS, 1. LANDLORD AND TENANT.

LEGISLATURE.

See COURT, DISTRICT, 2. RAILROADS, 1, 2. REVENUE, 8. ST. LOUIS, CITY OF, 1, 4, 5, 8, 11.

LIEN.

See CONVEYANCES, 1.

LIMITATIONS.

1. *Limitations—Adverse possession, what proof of required.*—In an action of ejectment it is not necessary to the success of a defense under the statute of limitations that the adverse character of defendants' possession should be brought home to the actual knowledge of plaintiff by affirmative proof. If the defendants' possession be adverse to all others, open and notorious, and held by them under claim of title, it is sufficient in its character, whether plaintiff knew the facts or not.—Scruggs v. Scruggs, 142.

2. *Banks, liability of—Limitations as to time.*—The act of the Legislature of February 15, 1864 (Sess. Acts 1863-4, p. 13), entitled "An act amendatory of the act to regulate banks and banking institutions," which provided in section 3 of said act that all claims, dues, and demands of said banks not presented within two years should be forever barred, saving the usual disabilities, did not establish so unreasonable a period of limitation that the Supreme Court will declare the law unconstitutional. As it was an act that attracted almost universal attention, and but a small quantity of notes were in circulation, the owners of the notes had ample time to protect themselves; and if they failed to exercise the diligence necessary for that purpose, their loss is attributable solely to their own carelessness and neglect.—Stephens v. St. Louis National Bank, 385.

3. *Statutes of Limitations—Presumptions.*—Statutes of limitations proceed upon the presumption that by lapse of time and omissions on his part the

LIMITATIONS—(*Continued.*)

party has forfeited his right to assert his title at law. While it is incumbent on every good government to furnish its citizens with the necessary and efficient remedies, it is not bound to keep its courts open an indefinite period to accommodate those who refuse or neglect to apply for redress within a reasonable time.— *Id.*

4. *Statutes of Limitation — Essentials to validity of.*—Limitation acts are based on the idea that the party has had an opportunity to try his rights in the courts. A statute which should bar the existing rights of claimants, without affording that opportunity, after the time when the statute should take effect, would not be a statute of limitations, but an unlawful attempt to extinguish rights and destroy the force of contracts. It is essential, therefore, to their validity, that they allow a reasonable time after they are passed for the commencement of suits upon existing causes of action.—*Id.*

5. *Limitations, Statute of — Absence from State — Construction of statute.*—Section 16 (Gen. Stat. 1865, p. 747) modifies the doctrine that the statute of limitations, when once in motion, runs on without interruption; and as a mere temporary absence does not stop the running of the statute, so a mere temporary return or "flying visits," after the residence is changed, will not stop the running of the exception.—Johnson v. Smith, 499.

6. *Limitations — Construction of statute — Departure from State — Residence —Domicile — Intention.*—The words "depart from and reside out of the State," as employed in the statute (Gen. Stat. 1865, p. 747, § 16), do not necessarily mean a departure with the intent to change permanently the residence of the party. The words "domicile" and "residence" have different meanings. The debtor's "intentions," which enter so largely into questions as to domicile, are of no benefit to the creditor so long as the debtor keeps out of the reach of process and thus avoids a personal judgment against himself. It is the fact of absence beyond the reach of process, for a substantial period of time and for a purpose not transient in its character, that is important.—*Id.*

M

MANDAMUS.

1. *Courts — Clerk — Office of — Mandamus — When it will issue —Quo warranto, when a proper remedy.*—Where a person had been duly commissioned and appointed by the governor of this State, under section 22, article IV, constitution of Missouri, to the office of circuit clerk, to fill a vacancy caused by the death of the previous incumbent, and the judge of the court of which he had been appointed clerk refused to receive his bond as clerk: *held*, that the commission issued by the governor was at least *prima facie* evidence of title to the office, and a peremptory mandamus will issue to compel the judge of the court to perform the duties devolved upon him by law; and if the validity or legality of the commission should be disputed, the question can only be determined by a proceeding in the nature of a *quo warranto*.—Beck v. Jackson, 117.

2. *County Treasurers — Mandamus — Jurisdiction of the Supreme Court.*—There is no doubt of the jurisdiction of the Supreme Court by *mandamus* against county treasurers who refuse to pay claims properly audited. They

MANDAMUS—(*Continued.*)

are ministerial officers, and can be compelled to perform their plain duties.—State *ex rel.* Thomas v. Treasurer of Callaway County, 228.

3. *County Treasurer — Illegal claims — Mandamus.* — It does not follow, because it is the duty of the treasurer to pay such claims, that the Supreme Court will necessarily, in this form of action, order him to do so. If it should appear that the County Court has, by mistake or otherwise, audited an illegal claim — one which should have been rejected — this court will leave the parties to such remedies as they may have by ordinary proceedings.—*Id.*

4. *Mandamus — Secretary of State — Duty in counting up votes.* — The law relating to elections (Gen. Stat. 1865, ch. 2, § 32) does not vest in the secretary of State any discretion in opening and counting returns of votes. It requires him to perform the act. It is the law declared by this court, as well as by the uniform current of authority, that a county clerk or secretary of State, in opening and casting up votes, acts ministerially, and not judicially. The matter of determining upon the legality of votes is a judicial function, to be passed upon before a tribunal competent to make an adjudication, where the parties can be heard.—State *ex rel.* Bland v. Rodman, 256.

5. *Secretary of State — Mandamus not issued, when.*—*Mandamus* will not be issued to compel the secretary of State to open and count up votes, where the office in contest is already filled by an officer holding under color of right.—*Id.*

6. *Mandamus — Clerk — Term of office — Elections — Constitution — Vacating Ordinance — Construction of statute.* — Under section 22, article VI, of the State constitution, the term of office of the clerk of a Circuit Court expired in January, 1867, even though in 1864 he had been elected for four years, and after the office had been declared vacant by the ordinance of March 17, 1865, and in pursuance of the provisions of that ordinance he had been reappointed "for the remainder of his term of office." But where no election of clerk was had in 1866, as provided in section 22, article VI, the prior incumbent, under the constitution, held over until the election and qualification of his successor. — State *ex rel.* McHenry v. Jenkins, 261.

MISTAKE.

See CONVEYANCES, 2, 3. EXECUTIONS, 7. PRACTICE, CIVIL — ACTIONS, 2.

MORTGAGES AND DEEDS OF TRUST.

1. *Note — Mortgage — Innocent indorsee — Title of, to land secured by.* — A *bona fide* indorsee of negotiable paper received before maturity is not affected by any latent equities between the original parties to it. But this rule is an incident of its negotiability, and is established by the law merchant; and the indorsee by such indorsement acquires no legal interest in property conveyed by deed of trust to secure the note. The mortgagee retains the legal title; and if the deed of trust is fraudulent and void, the indorsee of the note cannot enforce it against an attaching creditor whose rights attached before the indorsement of the note.—Potter v. McDowell, 93.

2. *Note — Mortgage — Release.* — Three indorsements were procured upon a bill of exchange payable at four months, and certain lands were mortgaged to the indorsers to indemnify them. At maturity of the bill, another, payable at three months, drawn and indorsed by the same parties, was procured and discounted,

MORTGAGES AND DEEDS OF TRUST—(*Continued.*)

and the proceeds applied to the payment of the first bill; and two of the indorsers, without the knowledge of the third, caused satisfaction of the first mortgage to be entered of record: *Held,* that such an entry, without the consent of the the third indorser, constituted no release, and that the mortgage remained as security for the new bill.—Thornton v. Irwin, 153.

3. *Mortgage, sale under—Purchase by mortgagee by interposition of another.*—Where at a sale of land by mortgagees the same was purchased by one of them through the interposition of a third person, such interposition was held to be a badge of fraud, and the sale was voidable at the instance of the mortgagor.—*Id.*

4. *Trusts—Purchase of trust property by trustee.*—Trustees, agents, administrators, guardians, attorneys, or others, whose connection with any other person is such as to establish a confidential relation between them concerning his property, or give them special knowledge and opportunities in regard to it, cannot without, and often cannot with, his full knowledge and consent, become the purchasers of such property, even though the sale was at public auction, *bona fide,* and for a fair price. And the rule applies although the trustee was a mortgagee with power to sell, and was also a creditor.—*Id.*

5. *Practice, Civil—Pleadings—Inconsistency.*—In an action to set aside a sale made under a mortgage, the averments that the mortgage was satisfied, and that, notwithstanding, the property was sold under it and bid in by one of the mortgagees, are not necessarily inconsistent.—*Id.*

6. *County Court—Schools—Mortgages—Power of sale by court without notice—Construction of statute.*—Where the owner of land borrowed five hundred dollars of the County Court, and secured the amount, under the provisions of the school act of 1839, by mortgage of the land, the court properly ordered the sheriff to sell, and he properly proceeded to sell the premises without giving the mortgagor notice of their proceedings. (R. C. 1855, pp. 1424–5, §§ 23–27, 30.) The ten days' notice mentioned in section 18 of the school act (R. C. 1855, p. 1424, § 24) refers expressly to the order to give a new security or make such payment as is necessary for the security of the fund, and not to the fact that the interest or the mortgage note is due.—Hurt v. Kelly, 238.

7. *County Court—Mortgage—Power of Legislature.*—The Legislature has power to authorize such a sale without notice, where the mortgagor, in the mortgage itself, gives express authority to that effect.—*Id.*

8. *Conveyances—Deeds of trust—Surplus funds.*—A party to whom land was conveyed subject to a deed of trust became thereby substituted to the place and right of the grantor, and as such was entitled to receive the surplus funds remaining after the sale under the trust deed.—Reid v. Mullins, 306.

9. *Mortgage—Petition for foreclosing, a statutory and not an equitable proceeding.*—It is well settled that a petition for the foreclosure of a mortgage, under the statute, is a proceeding at law and not a proceeding in chancery; and the jurisdiction is to be exercised, not according to the doctrines and practice of equity, but according to the practice and principles of law. (Statutes collated.) Section 18, pp. 1090–91, R. C. 1855, which declares that proceedings under the statute shall conform, as near as may be, to the proceedings in ordinary civil actions, is not to be understood as intending to abolish the distinction between a statute proceeding at law and a petition in the nature of a bill in equity to foreclose a mortgage.—Fithian v. Monks, 502.

MORTGAGES AND DEEDS OF TRUST—(*Continued.*)

10. *Mortgage, foreclosure of—Judgment over, personally, against defendant, a statutory judgment.*—Where the petition for the foreclosure of a mortgage which prayed that, if the mortgaged premises were insufficient to satisfy the mortgage debt, judgment over might be rendered personally against the debtor, and judgment rendered thereupon awarded execution, in case the mortgaged premises should be insufficient to satisfy the debt, "against the other goods, chattels, lands, and tenements" of defendants: *held*, that such prayer and judgment showed the proceedings foreclosing the mortgage to be under the statute, and not in equity.—*Id.*

11. *Mortgage—Assumption of mortgage by vendee of mortgagor—Judgment against vendee, effect of.*—In case of sale of the mortgaged property to a third party, even though the vendee expressly assumes, as a part of the consideration of the purchase, to pay off the amount of the mortgage judgment for a residue of the debt unsatisfied by the mortgage estate cannot be rendered against him personally in this State. The equity doctrine that such a contract of the vendee with the mortgagor amounts to an additional security taken by the latter, and inures to the benefit of the mortgagee by equitable subrogation, cannot hold under the laws of Missouri. (R. C. 1855, ch. 113, § 11.) Such vendee is in no sense a mortgagor, either by subrogation or otherwise. As the proceeding for foreclosure in such case is purely statutory, the remedy cannot be extended beyond its provisions, and it authorizes in no instance a personal judgment over for the residue, where a deficiency occurs, except in the case of the mortgagor.—*Id.*

See ADMINISTRATION, 1.

N

NEW TRIALS.

See PRACTICE, CIVIL—APPEALS.

O

OFFICERS.

1. *Clerk of the House of Representatives—Copying Journal—Compensation.*—The compensation provided for in section 20, chapter 7, Gen. Stat. 1865, for copying the laws and journal of the House of Representatives for the press, is not a part of the legal perquisites of the office of clerk of the House. Even if the clerk is appointed to perform that duty by a resolution of the House, his appointment is not as such officer, and his compensation is independent of his compensation as such officer. And where there had been two clerks, one succeeding the other, and the last one, being appointed to copy said journal and prepare it for the press, simply gathered up and arranged the loose rolls or rough minutes, as written out by both clerks from day to day, and delivered them to the printer, the first clerk was not entitled to any part of the compensation for copying and preparing the journal for the press by virtue of having written out a part of the rolls or rough minutes, which were afterward used as copies for the press. His writing out these minutes was only part of his duties as clerk, for which he was compensated by his salary as such.—State *ex rel.* Doane v. Draper, 220.

OFFICERS—(*Continued.*)

2. *County Attorney—Vacancy in office of, not created by indefinite absence.*—Under the provisions of section 31, chapter 18, Gen. Stat. 1865, the absence of the county attorney from the county, although for an indefinite time, does not create a vacancy in his office.—Kouns v. Draper, 225.
3. *County Attorney—Appointment of substitute in his absence does not create or presume a vacancy in his office.*—Under the provisions of section 26, chapter 18, Gen. Stat. 1865, where the county attorney is unable to attend as required by law, and some other person is appointed to act for him, it is not to be considered that the office is therefore vacant, and that the State or county is to be charged for the services which the law makes it the duty of the official attorney to perform.—*Id.*
4. *County Treasurer—Warrant upon—Reversal of order for, by County Court.*—Where an allowance by the County Court has been regularly had upon a claim they are required to pass upon, and the warrant has been drawn and presented, and the court adjourned for the term, the county treasurer has but one duty—that of payment; and no subsequent court, not of superior jurisdiction, can excuse him from the performance of that duty.—State *ex rel.* Thomas v. Treasurer of Callaway County, 228.
5. *County Treasurers—Mandamus—Jurisdiction of the Supreme Court.*—There is no doubt of the jurisdiction of the Supreme Court by *mandamus* against county treasurers who refuse to pay claims properly audited. They are ministerial officers, and can be compelled to perform their plain duties.—*Id.*
6. *County Treasurer—Illegal Claims—Mandamus.*—It does not follow, because it is the duty of the treasurer to pay such claims, that the Supreme Court will necessarily, in this form of action, order him to do so. If it should appear that the County Court has, by mistake or otherwise, audited an illegal claim—one which should have been rejected—this court will leave the parties to such remedies as they may have by ordinary proceedings.—*Id.*
7. *Registering Officers—Compensation of.*—Under the provisions of sections 27, 29, of the act of March 31, 1868 (Sess. Acts 1868, p. 138), the allowance of three dollars per diem is paid to the registering officers as compensation. This allowance is not designed to cover all expenses; the other expenses, as well as this compensation, must be paid by the county.—*Id.*
8. *Mandamus—Secretary of State—Duty in counting up votes.*—The law relating to elections (Gen. Stat. 1865, ch. 2, § 32) does not vest in the secretary of State any discretion in opening and counting returns of votes. It requires him to perform the act. It is the law declared by this court, as well as by the uniform current of authority, that a county clerk or secretary of State, in opening and casting up votes, acts ministerially, and not judicially. The matter of determining upon the legality of votes is a judicial function, to be passed upon before a tribunal competent to make an adjudication, where the parties can be heard.—State *ex rel.* Bland v. Rodman, 256.
9. *Secretary of State—Mandamus not issued, when.*—*Mandamus* will not be issued to compel the secretary of State to open and count up votes, where the office in contest is already filled by an officer holding under color of right.—*Id.*
10. *State and County Collector—Levy under an irregular assessment—Trespass.*—If the law under which an assessment is made be not unconstitutional, even though the assessors committed an irregularity in the manner of

OFFICERS—(*Continued.*)

making the assessment, the collector cannot be held liable, in an action of trespass, for executing a warrant for the collection of the tax founded on such assessment.—Glasgow v. Rowse, 479.

11. *Conveyances—City of St. Louis—Deed by mayor need not recite his authority to act.*—Where, under a resolution of the city council of St. Louis which directed the mayor to execute a deed of certain real estate to the legal representatives of A., and the deed was made to B. without stating that he was the legal representative of A., but recited that it was made under a compromise sale in pursuance of a resolution of the city council, naming the date when the resolution was approved: *held*, that the deed contained a good title on its face, and must be considered presumptive or *prima facie* evidence of title. Deeds by municipal officers acting under ordinances or resolutions of the law-making power of the corporation need not recite the ordinances or resolutions, nor show on their face that the contingency has happened which would authorize the sale.—Jamison v. Fopiana, 565.

12. *Trusts and Trustees, rules governing—City authorities.*—The rules that govern trustees in the execution of their trusts do not apply to city authorities. —*Id.*

See ATTACHMENTS, 1. EXECUTIONS, 13. MANDAMUS, 1. RAILROADS, 1, 2, 3, 4. REVENUE, 5. ST. LOUIS, CITY OF, 3, 7, 10, 11. STATUTE, CONSTRUCTION OF, 3.

ORDINANCES, CITY.

1. *City ordinances—Beer saloons—Females found employed in carrying beer—Construction of ordinance.*—The ninth subdivision of section 1, article IV, of ordinance 5421 of the ordinances of St. Louis, was intended to embrace any one of the class of persons therein designated "found employed" in saloons carrying beer, whether they act as proprietors or servants.—State v. Canton, 48.

2. *City of St. Louis—Charter—Repaving of streets, by whom ordered.*—The nineteenth section of ordinance No. 5399 of the ordinances of the city of St. Louis, entitled "An ordinance establishing and regulating the engineer department" (Rev. Ord. 1866, p. 328), which provides that, within certain limits therein designated, the mayor is "authorized to cause the carriage-ways of the streets thereof to be repaved with wooden pavements, wherever and whenever he shall deem it necessary," is contrary to the provisions of section 3 of an act of the General Assembly of the State of Missouri, entitled "An act supplementary to the several acts to incorporate the city of St. Louis," approved March 5, 1855 (Rev. Ord. 1866, p. 108), which provides that, "in all cases where the city council shall deem it necessary, and also in all cases where the owners of the major part of the lots or land fronting on any paved street, or portion of a paved street, may petition for repaving the same, the city council shall cause such repaving to be done in manner prescribed by ordinance." Said section 19 of said ordinance is therefore void. It was the intention of the Legislature, in conferring this power to repave streets, that the council should act, in determining this subject, in its legislative capacity; and power to act in that capacity cannot be delegated.—Ruggles v. Collier, 353.

3. *City of St. Louis—Charter—City Council—Repaving streets—Policy of Legislature concerning.*—Said nineteenth section is not only violative of

ORDINANCES, CITY—(*Continued.*)
the express and positive language of the statute, but it defeats the whole policy which was a primary consideration in its passage. That exercise of judgment, discretion, and care which the persons most deeply interested had a right to expect on the part of those to whom they committed this important trust, perhaps on account of their peculiar fitness, is, by the operation of section 19, absolved and shifted, and placed in the mere discretion of a city officer.— *Id.*

4. *Invalid ordinance — Subsequent approval of contract made under, effect of.*—The subsequent approval of a contract, made under the provisions of section 19 of the ordinance above cited, is not sufficient to impart life or vitality to the contract made by the mayor, which was wholly void at its inception. The provision of the charter that every contract, although made in pursuance of a valid ordinance, is to be submitted to and approved by the council before it is final and complete, is designed to hold a check and control over the officer making the contract, and to see that it is made conformably to law; but it does not relate back to or cure defects in the ordinance itself.— *Id.*

5. *St. Louis, City of — Charter — District sewers, ordinance concerning — Engineer, delegation of power to.*— Section 16, chapter 8, of an act entitled "An act to revise the city charter of the city of St. Louis," approved March 19, 1866 (Sess. Acts 1865-6, pp. 297-8), giving the city council power to construct district sewers, provides that "such sewers shall be of such dimensions as may be prescribed by ordinance." *Held*, that ordinance 5875, providing that a sewer therein authorized to be constructed on the premises of appellant should be "of such dimensions and of such materials as may be deemed requisite by the city engineer," was not in legal conformity with said provision of the charter, and should be disregarded. The city council cannot delegate a duty plainly and expressly devolved upon them to the mere discretion and caprice of a single individual.— City of St. Louis, to use of Murphy, v. Clemens, 395.

See ST. LOUIS, CITY OF.

P

PARTNERSHIP.

1. *Partnership — Consent — Representation.*—A man cannot be made a partner against his will, by accident, or the conduct of others. He must agree to be a partner, or, as to outsiders, hold himself out as a partner to those who have trusted him as such.— Freeman v. Bloomfield, 391.

2. *Contract agreeing upon no mutuality of losses, not a partnership.*—Where a contract contained an express provision to indemnify one of the parties for all loss of capital advanced by him in the business during the first four months, and to pay him for the value of his services during that time, in case he should then leave, with the proviso only that he should, at the end of that time, make a correct exhibit of the business; and the contract further stipulated that thereafter, if the business continued, there should be a mutual share of the profits and losses: *held*, that up to the expiration of the first four months no partnership existed under the contract.—Whitehill v. Shickle, 537.

3. *Contract — Partnership, mutuality of losses necessary to.*— To constitute a partnership between the parties themselves, there must be a communion of

PARTNERSHIP—(*Continued.*)

profits between them. A communion of profits implies a communion of losses. Neither reason nor authority seems to favor the rule that there may be a legal and valid partnership although one or more of the partners are guaranteed by the others against loss.— *Id.*

4. *Contract — Partnership — Covenant, action on may be had in law.*— Even where a party to a contract was held to be a partner by the terms of the contract, yet, if it contained an express covenant to pay him his losses, or the amount of his advances less his receipts, at the end of a specified time, an action at law on the covenant may properly be resorted to, and a bill in equity calling for a settlement of partnership accounts is unnecessary.— *Id.*

PRACTICE, CIVIL.

1. *Practice — District Court — Exception to action of.*— Sections 27 *et seq.*, chap. 169, Gen. Stat. 1865, relate exclusively to the practice and proceedings in the Circuit Courts, and have no reference to the District Court. That exceptions to the action of the District Court should be saved, in order to bring causes to this court, would only be required by resorting to an act of judicial legislation. And, in the absence of any direct statutory requirement, there is no apparent reason why a party should be compelled to except in the District Court. A bill of exceptions will only lie to review a decision made at the trial of a cause; and if it be so framed as to show that the exception was taken to a decision *in banc*, made after the trial, an appellate court cannot look into it. Hence, this court will overrule a motion to dismiss an appeal for want of such exceptions.— Quincy & Palmyra R.R. Co. v. Taylor, 35.
2. *Practice, Civil — Set-off — Insolvency of plaintiff.*— Where a demand sought to be set off by defendant against plaintiff's cause of action was certain and definite, and the insolvency of the plaintiff was admitted, the chancellor had jurisdiction to retain the matter and give full and final redress by decreeing a set-off or any other relief consistent and proper in the case.—Field v. Oliver, 200.
3. *Practice, Civil — Failure to make demand, when available to defendant.*— Defendant cannot take advantage of the failure of plaintiff to make demand unless he expressly set it up by way of defense in his answer, and accompany it with a tender of the amount due; in which case, if plaintiff will further prosecute his suit, and does not recover a greater amount than is tendered, he shall pay all costs.— Reid v. Mullins, 306.
4. *Practice, Civil — Judgment, irregularity of, when may be set aside.* — In general a court will not correct or set aside its judgments except at the term when they are rendered. But, under the authorities and the statute (Gen. Stat. 1865, ch. 172, § 26), a judgment may be set aside for irregularity at any subsequent term within three years from its rendition.—Downing v. Still, Adm'r, 309.
5. *Practice, Civil — Judgment for plaintiff, when set aside.*—A party who is injured by a judgment is entitled to relief by the usual modes, whether the form of the judgment be for him or against him. The usual proceeding against irregularities is by motion. When such motion will lie he should not be driven to a higher court, but the tribunal where the wrong was done should furnish the relief, even where the judgment was in his favor. Where it was apparent that judgment in favor of plaintiff was rendered at his instance, with knowledge on his part of its irregularity, he should, perhaps, in punish-

PRACTICE, CIVIL—(*Continued.*)

ment of his fraud, be left to make what he could out of his invalid judgment; but his knowledge of such irregularity should be made to appear clearly.—*Id.*

6. *Execution — Sale, irregularities of sheriff in, may be set aside.* — Even if the proceedings in obtaining judgment were regular, or, being irregular, it were held that the plaintiff could not disturb them, yet if the execution sale were irregular, and the irregularity were alone on the part of the sheriff, the sale should be set aside.—*Id.*

7. *Practice, Civil — Voluntary judgment, by which plaintiff is defrauded of his rights, set aside, how.* — A party in whose favor a voluntary judgment has been entered, but so loosely and irregularly as to defraud him of his rights, may have the judgment set aside; and the proper proceeding for that purpose is by motion, and not by a bill in equity.—*Id.*

8. *Practice, Civil — Execution, irregularities in — Purchasers at, notice to — Non-appearance of parties.*— If a party who is properly in court and has knowledge of the process desires to set aside an execution sale for error or causes not appearing of record, he must act at the return term of the execution. After, by his silence, he has suffered the sheriff to deed the property, and the rights of third parties have intervened, his acquiescence is presumed. But if the proceedings in obtaining the judgment or in effecting the sale be irregular, the purchaser buys with notice thereof. Nor does the rule apply where there is no actual appearance of the party, and where the proceedings are without his knowledge.—*Id.*

9. *Practice, Civil — Courts — Jurisdiction, how acquired — Service of process.*— Jurisdiction over the party is acquired when the person is actually and personally served with process within the territorial limits of jurisdiction, or where he appears and, by his pleadings, admits the jurisdiction. Jurisdiction of the cause is the power over the subject matter given by the laws of the sovereignty in which the tribunal exists.— Fithian v. Monks, 502.

10. *Practice, Civil — Practice act of* 1849 — *Decision of court on question of fact, informalities in.*—In a decision on trial of a question of fact by the court, under the statute of 1849 (Laws 1849, p. 90), where the facts are fully found, and judgment is given and is a necessary result of the facts, the judgment is not invalidated by reason of an informality in the order of statement of the facts and the conclusions of law.— Smith v. Harris, 557.

See EVIDENCE, 5. JUDGMENTS, 1, 2, 3, 4. PRACTICE, CIVIL — PLEADINGS, 14.

PRACTICE, CIVIL — ACTIONS.

1. *Replevin — Evidence — Naked possession — Title.*—Where plaintiff's title is denied, naked possession is not sufficient to maintain an action for the claim and delivery of personal property. The plaintiff must prove that he had a general or special property in the thing sought to be recovered.— Gartside v. Nixon, 138.

2. *Practice, Civil — Actions — Replevin — Property placed on another's land by mistake.*—Where a person placed his fence upon another's land by mistake, and it remained there by the consent of the owner of the land for fifteen years, at the end of which time the latter requested its removal, and shortly afterward carried it away himself without the permission of the former: *held*, that an action for replevin of the fence was properly brought.— Hines v. Ament, 298.

PRACTICE, CIVIL—ACTIONS—(*Continued.*)

3. *Mortgage — Petition for foreclosing, a statutory and not an equitable proceeding.* — It is well settled that a petition for the foreclosure of a mortgage, under the statute, is a proceeding at law, and not a proceeding in chancery; and the jurisdiction is to be exercised, not according to the doctrines and practice of equity, but according to the practice and principles of law. (Statutes collated.) Section 18, pp. 1090-1, R. C. 1855, which declares that proceedings under the statute shall conform, as near as may be, to the proceedings in ordinary civil actions, is not to be understood as intending to abolish the distinction between a statute proceeding at law and a petition in the nature of a bill in equity to foreclose a mortgage.—Fithian v. Monks, 502.

4. *Equity—Action to enjoin recovery in ejectment—Fraud—Prior possession.*— A., the owner of certain real estate, many years after its purchase, discovered that the acknowledgment of the conveyance by the original grantor was defective, and procured from B., his only heir, a quit-claim deed of the property. Shortly prior to the date of said deed, C., by false inducements, had obtained from B. another deed of quit-claim for the same property, and, some time after the making of the deeds, brought suit of ejectment against A. In an action to enjoin a recovery of C. in the ejectment suit, in consequence of such fraud: *held,* that A., as well as B., could properly institute proceedings in the injunction.—Smith v. Harris, 557.

5. *Equity — Assignment of naked right to property — Prior possession.* — Although the grantor of real estate who was entitled to have the conveyance set aside for fraud cannot assign his naked right of action in order that his assignee may sue in his own name, yet where the right of the assignee to the property did not depend alone upon the assignment, but his purchase, interest, and possession were long antecedent thereto, and the taking a deed from the assignor was only a step to protect that purchase, the grantor may proceed in his own name by injunction.—*Id.*

6. *Landlord and Tenant — Use and occupation, action of.*— The action for use and occupation cannot be maintained, unless the relation of landlord and tenant, express or implied, exists between the parties.— Edmonson v. Kite, 176.

7. *Landlord and Tenant — Use and occupation, action of — Trespasser.*— A trespasser cannot be sued for use and occupation, nor can the landlord waive the tort and proceed against him as a tenant.— *Id.*

See INFANTS, 1, 2. JUDGMENTS. LANDLORD AND TENANT, 1. 2. LAND TITLES, 1. MANDAMUS. PARTNERSHIP, 4. QUO WARRANTO.

PRACTICE, CIVIL — APPEALS.

1. *Practice, Civil — Damages for opening streets — Appeal.*— Under the charter (article VI, §§ 2, 3, 4) and ordinances (ordinance approved August 7, 1866) of the city of St. Joseph, the property of appellants, bordering Fourth street in that city, was condemned and damages assessed by a jury in their favor, amounting to three thousand dollars. The verdict was reported by the mayor to the city council and by them rejected. From this verdict no appeal was taken by either party. Afterward, by order of the city council, the property was again condemned and damages awarded of $1,500. From this verdict appellants appealed to the Circuit Court, and, on motion, judgment was rendered in their favor for the amount of the first award. *Held,* that the second proceeding was in the nature of a new suit, commenced on new process,

PRACTICE, CIVIL—APPEALS—(*Continued.*)

and not a continuation of the former, and that the Circuit Court could take no jurisdiction of the first award.—City of St. Joseph v. Hamilton, 282.

2. *Practice, Civil—Damages for widening streets—Verdict may be quashed, when.*—If the second assessment was a nullity, that was good ground for quashing it. The charter of the city of St. Joseph contained no warrant authorizing the city to reject the first award and by new proceedings to obtain another. Such proceeding in effect allows the party to set aside a judgment according to its own caprices, until it finally obtains one to suit its purposes. Such a power, if desirable, should be given in plain terms, and not rest for its basis on forced and artificial interpretations. If the city elected to abandon the enterprise, and not to take the property, there was no divestiture of title from the owner, and he was not entitled to pay from the public.—*Id.*

3. *Practice—Supreme Court—Appeals—Evidence.*—In appeal cases where no question of law is presented or saved in a manner which this court can review, it will not undertake to weigh the evidence to determine whether it justified the finding in the trial court.—Easley v. Elliott, 289.

4. *Practice, Civil—District Courts, judgments of reversal and remander in—Appeal from.*—It is now well settled that the judgments of reversal and remander in District Courts are such final judgments as will sustain an appeal or writ of error to the Supreme Court.—Tilford v. Ramsey, 410.

5. *Practice, Civil—Act reorganizing St. Louis Circuit Court—General Term—District Court—Appeals.*—Under the provisions of section 17 of the act reorganizing St. Louis Circuit Court (Gen. Stat. 1865, p. 890), as to the subject of appeals, the Supreme Court holds the same relation to the Circuit Court of St. Louis county, in general term, as to the District Courts of the State. The words "as is now or may hereafter be provided" refer to the whole subject matter of the appeal—as well to the character of the final judgments appealed from as to the manner of taking them up.—*Id.*

6. *Act amending act reorganizing St. Louis Circuit Court—Legislative interpretation of—Construction of statute.*—The act amendatory of that reorganizing the St. Louis Circuit Court (Gen. Stat. 1865, p. 889), approved March 4, 1869, cannot have the force of a legislative interpretation of section 14 of said act, as it stood prior to its amendment, and a decision that no right of appeal to the Supreme Court from a judgment of reversal and remander in the Circuit Court, in general term, existed previous to said amendatory act. The Legislature, while it may make laws, has no power to interpret such existing laws as do not apply to its own duties.—*Id.*

7. *Practice, Civil—Judgment for excess—Reversal of—Remitter.*—Where a judgment is sought to be set aside or reversed, for the reason only that the judgment rendered was for too much, and plaintiff has filed below, though too late, a remitter of the excess, justice always demands that any court that has power to render judgment should accept the remitter and enter judgment for the true amount. But if plaintiff is at fault below in this matter, he should pay the costs occasioned by his negligence.—*Id.*

8. *Practice, Civil—New Trial—Discretionary with what court—St. Louis Circuit Court, in general term, is appellate.*—The order of court granting a new trial rests to a great extent in the discretion of the court, when granted by the same court in which the first trial was had. But this doctrine does not apply to courts of error. The Circuit Court of St. Louis county, in general

PRACTICE, CIVIL—APPEALS—(*Continued.*)

term, is an appellate court, like the District Courts outside of St. Louis county; and its decisions in regard to the action of the Circuit Court in special term, made under section 17 of the act reorganizing the St. Louis Circuit Court (Gen. Stat. 1865, p. 887), should be governed by rules applicable to appellate courts.—*Id.*

9. *Practice, Civil—New Trial—Newly-discovered evidence.*—No rule is better settled than that new trials claimed on the ground of newly-discovered evidence will never be allowed unless the party has used due diligence to discover and produce the evidence.—*Id.*

10. *Practice, Civil—New trial on ground of mistake or perjury of witness, when granted.*—The granting of a new trial in cases of perjury or mistake by a witness rests in the sound discretion of the Circuit Court, and it would require a case of the grossest character to authorize the Supreme Court to interfere.—Jaccard v. Davis, 535.

11. *Practice—New trial on ground of newly-discovered evidence designed to impeach former witness not granted.*—It is well settled that a new trial will not be granted on the ground of newly-discovered evidence which is simply intended to impeach or contradict the testimony of a witness at the original trial.—*Id.*

See JUSTICES' COURTS, 4. PRACTICE, SUPREME COURT.

PRACTICE, CIVIL—NEW TRIALS.

See PRACTICE, CIVIL—APPEALS.

PRACTICE, CIVIL—PLEADINGS.

1. *Practice—Pleading—Joinder of causes of action—Equity—Ejectment.*—Proceedings instituted by plaintiff for the purpose of vacating the title to real estate and vesting the same in himself, and at the same time to eject the defendant and have possession of the premises awarded to himself, are fatally erroneous on writ of error or appeal, and cannot be sustained. (Peyton v. Rose, 41 Mo. 257, cited and affirmed.)—Curd v. Lackland, 139.

2. *Justices' Courts, practice in—Power of Justice to set aside non-suit.*—Where a justice of the peace, after hearing of testimony in a trial where both parties were present, on motion of defendant non-suited plaintiff, and afterward, at the instance of plaintiff, set the non-suit aside and granted a new trial, such action in setting aside the non-suit was no cause for reversing a judgment subsequently rendered in favor of plaintiff in the Circuit Court. Justices of the peace have no power to set aside non-suits except where they are rendered for non-appearance. But neither have they power to render an involuntary non-suit when a jury has been impaneled in the case.—Fortier v. Ball, 23.

3. *Justices' Courts—Non-suit—Appeal—Estoppel.*—Where defendant, after procuring non-suit, appeared before the justice at a second trial, and upon appeal to the Circuit Court had another trial, without complaining, he will not afterward be permitted in the District Court to set up the judgment of non-suit as a bar to the plaintiff's right to recover.—*Id.*

4. *Practice, Civil—Pleading—Trover—Demand—Tender—Instructions.*—In an action of trover, defendant cannot, by his instructions to the jury, either directly or indirectly avail himself of the want of demand by plaintiff for the property sued upon, unless the failure of demand has been

PRACTICE, CIVIL—PLEADINGS—(*Continued.*)

expressly set up by way of defense, accompanied with tender. (Gen. Stat. 1865, p. 691, chap. 173, § 34.)—Raithel v. Dezetter, 145.

5. *Practice, Civil—Pleadings—Inconsistency.*—In an action to set aside a sale made under a mortgage, the averments that the mortgage was satisfied, and that, notwithstanding, the property was sold under it and bid in by one of the mortgagees, are not necessarily inconsistent.—Thornton v. Irwin, 153.

6. *Practice, Civil—Pleadings—Causes, legal and equitable—Misjoinder.*—A petition containing in the same count a prayer for equitable relief, and also for rents and profits and for possession of the premises, is bad for misjoinder. The statute requiring the separate statement of legal and equitable causes of action should be strictly observed. But in such cases the equitable claim can be considered, and the rest of the petition may be treated as surplusage.—Young v. Coleman, 179.

7. *Practice, Civil—Pleadings—Misjoinder of causes of action.*—A misjoinder of causes of action in the petition is fatal; and where such defect is apparent upon the face of the record, this court will notice it on error or appeal, whether exceptions were saved or not.—Gray v. Payne, 203.

8. *Practice, Civil—Pleadings—Misjoinder of causes of action—Ejectment.*—In a bill to set aside a deed as fraudulent, the plaintiff cannot sue for a recovery of the land. A bill in equity is never the proper remedy for the recovery of real estate; the plaintiff must first obtain his decree vesting the title in him, and then resort to his action of ejectment. (Peyton v. Rose, 41 Mo. 257, cited and affirmed.)—*Id.*

9. *Practice, Civil—Pleading—Joinder of causes in law and equity, how treated by courts.*—Where plaintiff's petition combined an action at law and a suit in equity, and the trial was as of a proceeding in equity, a judgment rendered therein as though the trial had been that of a suit in ejectment can not be sustained. (Peyton v. Rose, 41 Mo. 257, cited and affirmed.) Either the chancery branch of the case must be rejected as surplusage, and a trial and judgment had as of a suit at law, or the law branch must be rejected, and a trial and judgment had in accordance with the rules of chancery practice.—Wynn v. Cory, 301.

10. *Practice, Civil—Recovery of land—Chancery—Relief—Ejectment.*—Where the title to real estate has been vested in a grantee by a deed duly executed and delivered, and such deed has been lost or destroyed without being recorded, a court of equity will lend its aid to protect the rights of the grantee and those claiming under him, by enjoining the grantor and his heirs and legal representatives from selling the property, and by divesting them of the title and vesting it in the grantee or those entitled to it under him. But he must establish his title thereto by a bill in chancery, with an appropriate prayer for relief. Until this is done he cannot sue for possession of the land.—*Id.*

11. *Practice, Civil—Pleadings—Answer—Negative pregnant—Ambiguity—Construction of statute.*—Where plaintiff's petition alleged that "on or about the 9th day of March, 1852, Archibald Peery, being the owner of the land hereinafter described, in fee simple, made, executed, acknowledged, and delivered to Henry W. Peery a deed by which he conveyed to said Henry W. the land in question," and defendant's answer thereto was in the following words: "The defendant denies that the said Archibald Peery, on the 9th day of March, 1852, or at any time before or since, made, executed, acknowledged,

PRACTICE, CIVIL—PLEADINGS—(*Continued.*)

and delivered to Henry W. Peery a deed by which he conveyed to said Henry W. Peery said land or any part thereof:" *held*, that there was nothing about the denial in the nature of a negative pregnant, nor was there any such ambiguity about it as to render it bad pleading under the present system; and that the construction given to the pleadings by the court in causing the answer to be stricken out was, in violation of Gen. Stat. 1865, p. 661, § 37, strict and technical, and was unwarranted.—*Id.*

12. *Practice, Civil—Pleading—Informalities to be objected to, when.*—Informalities in pleading should be objected to when they can be rectified by amendment. Where the record shows no objection taken to duplicity in pleading, it is too late to make it after the case passes into the appellate court.—Howard v. Clark, 344.

13. *Practice, Civil—Amended pleadings, when allowed.*—As a general rule, allowing an amended pleading to be filed out of time, when the defense had existed long previously, and no good reason is perceived for the delay, is a matter resting in the sound discretion of the court. But where the ends of justice will be subserved by granting the permission, it is better to allow it; and if the other party is taken by surprise, or a continuance is thereby occasioned, the court should put the defaulting party on terms.—Archer v. Merchants' and Manufacturers' Insurance Company, 434.

14. *Practice, Civil—Stipulation between attorneys—Demurrer—Answer, etc.*—By a written stipulation between attorneys it was agreed that defendant might withdraw his answer and file his demurrer to plaintiff's petition on condition that, in case the demurrer were overruled, final judgment should be entered thereon. *Held*, that the court properly refused defendant permission to withdraw his demurrer and the stipulation, and to file his answer to the merits on the ground of newly-discovered evidence, which, it was claimed, would support a defense. A party cannot be allowed to make an express agreement and avail himself of its advantages if it results in his favor, but not to be bound by it when it happens to prove disadvantageous.—Franklin v. National Insurance Company, 491.

15. *Contracts—Averments—Penalty—Assignment of breaches.*—A general statement that a party "totally disregarded all, and did not fulfill any, of the covenants and stipulations to be kept and performed, and made by him," etc., is too general to support a demand at law, especially for a penalty. In claiming a penalty, specific breaches must be assigned.—Whitehill v. Shickle, 537.

16. *Practice, Civil—Pleadings—Immaterial averments need not be denied.*—An immaterial averment of plaintiff's petition need not be denied, but a material averment must be, else it will be taken as confessed. In an action upon one of several insurance policies on a steamboat, the averment that she was worth more than all the insurance thereon is a material averment, and, if not denied in the answer, stands admitted.—Marshall v. Thames Fire Insurance Company, 586.

17. *Divorce—Recrimination—Cross-petition.*—In this State the rule has been long established that, in reply to an application for divorce, the defendant may allege, either by way of recrimination or cross-petition, the commission by the plaintiff of any offense that, by the statute, is made a cause for divorce. The least that can be required is that parties should come into court with

PRACTICE, CIVIL—PLEADINGS—(*Continued.*)

hands so far clean that the opposite party is not entitled to the same redress against them. If both parties have a right to a divorce, neither party has. The court must discriminate between them; must say which is the injured party, and which is entitled to relief.—Hoffman v. Hoffman, 547.

18. *Divorce—Practice, Civil—Pleadings.*—In a suit for divorce grounded upon absence without reasonable cause for the space of one year, the gist of the action is the willful absence without cause, and the petition should set forth facts which should advise the court that defendant has kept away against the will of the petitioner.—*Id.*

PRACTICE, CIVIL—TRIALS.

1. *Practice, Civil—Trials—Interlocutory judgments, when set aside.*—A meritorious defense and a reasonable degree of diligence in making it is all that it is necessary to establish in order to justify the setting aside of an interlocutory judgment.—Adams v. Hickman, 168.

2. *Practice, Civil—Instructions—Jury trial.*—Instructions are proper only where there is a jury trial, or where issues of fact in actions at law are submitted to the court.—Young v. Coleman, 179.

3. *Practice, Civil—Instructions are to be taken together.*—In an action for damages against a street-railway company for injuries resulting from the carelessness and negligence of defendant, if it appeared that plaintiff in any manner directly contributed to such injuries by his own wrongful or negligent act, he cannot recover. And an instruction given to the jury after they had retired to consider of their verdict, omitting the element of contributory negligence, if standing alone, would undoubtedly be bad. But if that point was fully met by other instructions, such omission would be no ground for reversal of the cause. Instructions are to be considered and construed in their combination and entirety, and not as though each separate instruction was intended to embody the whole law of the case.—McKeon v. Citizens' Railway Company, 405.

4. *Practice, Civil—Instructions.*—Instructions presenting issues not raised by the pleadings, or not predicated upon testimony, are improper.—Camp's Adm'r v. Heelan, 591.

5. *Practice, Civil—Trials—Instructions, must be taken together.*—In considering instructions given by the court, they must all be taken and construed together; and if they harmonize, and assert no inconsistent principle of law by which the minds of the jury could have been misled, they cannot be declared erroneous.—Marshall v. Thames Fire Insurance Company, 586.

6. *Practice, Civil—Evidence—Verdict—Weight of evidence in civil and criminal cases.*—In all civil cases, it is the duty of the jury to decide in favor of the party on whose side the weight of evidence preponderates, and according to the reasonable probability of truth; and such an instruction is proper in an action by steamboat owners on a policy of fire insurance, when the issue raised by the answer is whether plaintiffs caused the burning of the vessel. —*Id.*

See DOWER, 1, 2.

PRACTICE, CRIMINAL.

1. *Continuances—Rulings of court concerning; revised or interfered with, when.*—As a general proposition, the granting of a continuance is a matter

PRACTICE, CRIMINAL—(*Continued.*)

resting in the sound discretion of the court where the trial is had; and its ruling will not be revised or interfered with except in cases where manifest injustice has resulted; and to make such revisal or interference proper, the record should show clearly that the defendant has been affected injuriously by being deprived of the evidence which he would have obtained by further continuing the cause.—State v. Klinger, 127.

2. *Indigent defendants in criminal cases — Counsel appointed to defend, compensation of.*—Where the Circuit Court appointed attorneys at law to defend a person arraigned before it for a felony, and who was without counsel or means to employ counsel for his defense, the Legislature has failed to make any provision for the pecuniary compensation of those who, under the appointment of the court, rendered him this service.—Kelley v. Andrew County, 338.

3. *County not liable for costs and expenses in criminal cases.*—Under sections 1 to 4, ch. 219, Gen. Stat. 1865, pp. 865-6, the costs and expenses of prosecutions by the State for criminal offenses, where defendant is unable to pay them, are chargeable to the State—not to the county in which the trial is had; and therefore, if any compensation is to be paid to attorneys appointed by the Circuit Court to defend such person, such compensation is not payable by the county.—*Id.*

4. *County — Criminal prosecutions — Costs, payment of.*—Under our system, it is clearly the purpose and policy of the Legislature to relieve counties from the costs and expenses resulting from prosecutions for murder.—*Id.*

5. *Criminal law — St. Louis Court of Criminal Correction — Action for gambling — Evidence — Possession of faro-boxes, etc.*—In a prosecution in the St. Louis Court of Criminal Correction, for gambling, where it appeared from the evidence that defendant was found, with others, around a table, with a faro-box and cards in his hands, and that checks and money passed between them: *held*, that such testimony made a *prima facie* case for the State, and, in the absence of rebutting testimony and of any explanation as to what defendant and others were doing with these gambling devices, that he was properly convicted.—State v. Andrews, 470.

See EVIDENCE, 10, 11. HUSBAND AND WIFE, 1, 2.

PRACTICE, SUPREME COURT.

1. *Supreme Court — Weight of Evidence.*—The Supreme Court has nothing to do with matters simply resting on the weight of evidence. *Semble*, that this court will not interfere to disturb a verdict unless there is a total want of evidence to support it.—Faugman v. Hersey, 122.

2. *Practice — Supreme Court — Appeals — Evidence.*—In appeal cases where no question of law is presented or saved in a manner which this court can review, it will not undertake to weigh the evidence to determine whether it justified the finding in the trial court.—Easley v. Elliott, 289.

3. *Practice, Civil — Supreme Court — Reversal of judgment, effect of, upon sales.*—Where a judgment was reversed in the Supreme Court, and declared to be null and void, all of the proceedings had in pursuance of that judgment were vacated, and defendant was entitled to be restored to the condition in which he stood previous to the judgment, and to restitution of everything that he had lost and which remained in the hands of the adverse party, his agents,

PRACTICE, SUPREME COURT—(*Continued.*)

attorneys, or privies; and no suit is required to set aside a deed of land bought by an attorney of plaintiff in such judgment upon execution sale of defendant's property.—Hannibal and St. Joseph Railroad Company v. Brown, 294.

4. *Supreme Court—Evidence—Civil Causes.*—In a civil cause, where the court trying it approves the verdict by refusing to set it aside, and there is not an entire want of evidence in its justification, the Supreme Court will not interfere and reverse, although the verdict may seem to be greatly against the weight of evidence.—Gillespie v. Stone, 350.

5. *Practice, Civil—Practice act of* 1849—*"Case made" by applicant for review, what sufficient.*—Under the law of 1849 (Laws 1849, p. 90), the requirement to "make a case" is necessary for the purpose only of bringing up a matter for review; and when "so much of the evidence as may be material to the question" is brought up, accompanying the motion for review, the rule is satisfied, and it is immaterial whether the application be called "a motion for new trial and application for review," accompanied by the evidence, or a case containing the evidence.—Smith v. Harris, 557.

PRINCIPAL AND AGENT.

See AGENCY.

Q

QUO WARRANTO.

1. *Quo warranto—Writ of, when issued.*—In a mere contest between private persons in reference to an office, the remedy pointed out by the statute (Gen. Stat. 1865, chap. 157), authorizing proceedings of this character in the Circuit Court, ought to be followed out in all cases, unless it should appear to this court that there were special reasons why its constitutional jurisdiction should be exercised.—State *ex rel.* Young v. Buskirk, 111

See MANDAMUS, 1.

R

RAILROADS.

1. *Equity—Railroad, sale of—Act of Legislature confirming—Rescission and cancellation—Jurisdiction.*—Where, pending a bill in equity for rescission of the sale of a railroad by the governor, and also for an account and for damages, an act was passed by the Legislature confirming the sale, although the act is a complete bar to that part of the petition which demanded rescission, yet the court is not thereby deprived of all jurisdiction of the cause, but jurisdiction will be retained and justice administered as to the remaining portion of the petition.—State v. McKay, 594.

2. *Equity—Railroad, sale of—Resecizure, under clause of forfeiture in deed, does not ratify.*—After sale of a railroad by the governor, under an act of the Legislature, his seizure of the same, under and by virtue of a clause of forfeiture contained in the act and the deed of conveyance, was not an admission by the State that the sale and transfer were legal, nor did the seizure amount to a ratification of the sale. In the sale the governor was not acting in his political or executive capacity, but merely as a special agent; and the

RAILROADS—(*Continued.*)

duty might have devolved upon any other person as well. And if he proceeded beside the law or outside the law, the State would not be bound by his tortious acts or trespasses.—*Id.*

3. *Equity — Railroad, sale of — Reseizure by governor — Clause of forfeiture like one of re-entry by landlord.* — Where, after the sale of a railroad by the governor, seizure was made on account of a non-compliance with the terms of the contract, for the purpose of foreclosing the State's lien or mortgage, the clause of forfeiture was not distinguishable in principle from one of re-entry by a landlord for condition broken; and such seizure, even if in all respects legal and regular, did not deprive the State of any previous existing right.—*Id.*

4. *Equity — Railroad, sale of, by commissioners — Action for rescission, account, and damages — What damages plaintiff is entitled to, and against whom.*—If the commissioners for the sale of a railroad combined and confederated with other persons in the purchase of the property, the State will be entitled to whatever speculations they made out of the sale; and the other persons, by entering into the league with the full knowledge of the facts, will also be amenable.—*Id.*

See CORPORATIONS. DAMAGES, 3, 4, 8, 9. JUSTICES' COURTS, 5.

RAILROADS, STREET.

See DAMAGES, 9.

REGISTRATION.

1. *Registering officers — Compensation of.*— Under the provisions of sections 27, 29, of the act of March 31, 1868 (Sess. Acts 1868, p. 138), the allowance of three dollars per diem is paid to the registering officers as compensation. This allowance is not designed to cover all expenses; the other expenses, as well as this compensation, must be paid by the county.—State *ex rel.* Thomas v. Treasurer of Callaway County, 228.

REVENUE.

1. *Revenue — National Banking Associations — Shareholders — Assessment of taxes — Construction of statute.* — Under the provisions of the forty-first section of the act of Congress, approved June 3, 1864, amendatory of an act to provide a national currency secured by a pledge of United States stocks (U. S. Laws 1863-4, p. 112), the tax imposed by State authority upon shareholders in national banking associations must be specifically assessed against the shareholders, and not against the capital of the bank itself. But the provisions of the "Act for the assessment and collection of the revenue in the State of Missouri," approved February 4, 1864 (Adj. Sess. Acts 1863, p. 69, §§ 19, 20), are in consonance with the act of Congress in this respect. By these sections the assessment is distinctly and separately required to be made against the shares, and under these provisions the shareholders are liable.—Lionberger v. Rowse, 67 (80-2).

2. *Revenue — Act of Congress of June 3, 1864 — Proviso — Construction of statute.* — The proviso of the forty-first section of the act of Congress of June 3, 1864, prohibiting the imposition of any greater tax than is levied upon the shares of banks organized under State authority, is simply inhibitory of any unjust or unwise discrimination being made by which the national banks might be oppressed or taxed out of existence, and thus prevented from per-

REVENUE—(*Continued.*)

forming their proper functions as fiscal agents of the government; and it is no insuperable objection to the State law because this prohibition is not embraced in it.— *Id.* 81.

3. *Revenue — State National Banking Acts of 1863 — Obligation of contract — Whether impaired by.*— The national banks organized under the State law of 1863 do not come within the terms of the contract made by the State and the banks organized under the law of 1857. From the period in which they were re-organized the previously existing contract between them and the State was mutually dissolved, and was no longer binding on either party.— *Id.* 84.
4. *Revenue —United States National Banking Act of 1863 — Limitation by, as to rate of State taxation — Construction of statute.*— The proviso of the forty-first section of the national banking act (U. S. Laws 1863-4, p. 112), declaring that the tax upon the shares of the associations shall not exceed the rate imposed upon the shares of State banks, is not violated because two banks which have retained their distinctive State organization are taxed a less amount, according to their contract. The latter are exceptional cases, and not within the rules, spirit, or intention of the act of Congress. The banks referred to in that proviso were not spoken of in any restrictive sense, but meant to include all moneyed associations, savings and banking institutions; and the idea cannot for a moment be entertained that, because two banking institutions choose to rely on their charter and avail themselves of a special privilege guaranteed to them, therefore Congress ever contemplated that the whole moneyed capital of the State should be secured by a like exemption.—*Id.* 85.
5. *Revenue — Income tax —Assessment—Auditor—Act of February 20, 1865— The word "year," how used.*— Section 3 of the act of February 20, 1865 (Sess. Acts 1865, p. 112), enacted that the assessment upon salaries and incomes should be based upon the amount of such salary or income received by the person assessed in "the year next preceding the time of the assessment." The word "year," as therein used, referred to a fiscal year. And the auditor, in designating the 31st day of March, 1865, as the end of the year upon which assessments must be made, overstepped his authority; and the action of the assessors in obeying and conforming to his instructions was irregular. The whole assessment was not void, but was simply erroneous as regarded a part of the time. The plain meaning and true intent of the act was that the additional tax on incomes should be levied on an assessment for the preceding year, which would coincide with and be founded on the books theretofore made out by the respective officers.—Glasgow v. Rowse, 479.
6. *Revenue — Year, calendar, fiscal.*— Unless otherwise expressed, the word "year" will always be intended to mean a calendar year; but where applied to matters of revenue, the presumption is in favor of its referring to a fiscal year.— *Id.*
7. *State and county collector — Levy under an irregular assessment — Trespass.*— If the law under which an assessment is made be not unconstitutional, even though the assessors committed an irregularity in the manner of making the assessment, the collector cannot be held liable, in an action of trespass, for executing a warrant for the collection of the tax founded on such assessment.— *Id.*

REVENUE—(*Continued.*)

8. *Taxation — Constitution — Rule of equality or uniformity, how construed and applied — Legislature, power of.*— The constitutional requirement that taxation upon property shall be in proportion to its value does not include every species of taxation. Capitation taxes have effect solely upon persons. Income taxes have a mixed effect upon persons and property; yet neither species comes within the constitutional prohibition. The constitution enjoins a uniform rule as to the imposition of taxes on all property, but does not abridge the power of the Legislature to provide for a revenue from other sources. It was intended to make the burdens of government rest on all property alike—to forbid favoritism and prevent inequality. Outside of the constitutional restriction, the Legislature must be the sole judge of the propriety of taxation, and define the sources of revenue as the exigency of the occasion may require.— *Id.*
9. *State income tax, constitutionality of.*— The income tax, under the act above referred to, was uniform and equal as to the classes upon whom it operated. It did not come within the meaning of the term "property" as used and designated in the constitution, and it was not in conflict with any provision of that instrument.— *Id.*
10. *Revenue — Evidence — Tax books, certified copies of.*— Where a witness testified, without objection, to the assessment and amount of city, State, and county taxes, and to the payment of them by himself, and there was no countervailing proof in regard to the assessment and amount of taxes, the evidence was sufficient to prove the existence of the taxes, without a resort to the certified copies of the tax books.— Blumenthal v. Mugge, 427.

S

ST. JOSEPH, CITY OF.

See PRACTICE, CIVIL — APPEALS, 1. 2.

ST. LOUIS, CITY OF.

1. *Corporations — Ordinances, validity of, how tested.*— The real test of all ordinances passed by an incorporated body is the intention of the Legislature in granting the charter. Corporations cannot make ordinances contrary to their constitution.— Ruggles v. Collier, 353.
2. *Corporations — Legislative and ministerial powers, delegation of.*— There is a clear distinction between legislative and ministerial powers. The latter may be delegated; the former cannot. Legislative power implies judgment and discretion on the part of those who exercise it, and a special confidence and trust on the part of those who confer it.—*Id.*
3. *City of St. Louis — Charter — Repaving of streets, by whom ordered.*— The nineteenth section of ordinance No. 5399 of the ordinances of the city of St. Louis, entitled "An ordinance establishing and regulating the engineer department" (Rev. Ord. 1866, p. 328), which provides that, within certain limits therein designated, the mayor is "authorized to cause the carriage-ways of the streets thereof to be repaved with wooden pavements, wherever and whenever he shall deem it necessary," is contrary to the provisions of section 3 of an act of the General Assembly of the State of Missouri, entitled "An act supplementary to the several acts to incorporate the city of St. Louis," approved March 5, 1855 (Rev. Ord. 1866, p. 198), which provides

ST. LOUIS, CITY OF—(*Continued.*)

that, "in all cases where the city council shall deem it necessary, and also in all cases where the owners of a major part of the lots or land fronting on any paved street, or portion of a paved street, may petition for repaving the same, the city council shall cause such repaving to be done in manner prescribed by ordinance." Said section 19 of said ordinance is therefore void. It was the intention of the Legislature, in conferring this power to repave streets, that the council should act, in determining this subject, in its legislative capacity; and power to act in that capacity cannot be delegated.— *Id.*

4. *City of St. Louis — Charter — Repaving streets — By whose direction to be done — Design of Legislature.*— The Legislature clearly intended to place the responsibility of determining the matter of repaving the streets upon the city council, acting officially, when the initiatory steps were not taken by the property-owners themselves. The trust is, in effect, the power of taxation, which is the exercise of sovereign authority; and nothing but the most plain and explicit language can justify a court in holding that the Legislature intended to confer such exorbitant power on the mere discretion of a single city officer. —*Id.*

5. *City of St. Louis — Charter — City Council — Repaving streets — Policy of Legislature concerning.*— Said nineteenth section is not only violative of the express and positive language of the statute, but it defeats the whole policy which was a primary consideration in its passage. That exercise of judgment, discretion, and care which the persons most deeply interested had a right to expect on the part of those to whom they committed this important trust, perhaps on account of their peculiar fitness, is, by the operation of section 19, absolved and shifted, and placed in the mere discretion of a city officer.— *Id.*

6. *City of St. Louis — Amended charter — Repairing and repaving streets.*— The act "supplementary," etc., above cited (Rev. Ord. 1866, p. 107), most clearly distinguishes between repairing the streets and repaving them, and makes separate provision for the two cases. No special ordinance is required in the case of repairs, but repaving is not placed in the same situation.— *Id.*

7. *Invalid ordinance — Subsequent approval of contract made under, effect of.*— The subsequent approval of a contract made under the provisions of section 19 of the ordinance above cited is not sufficient to impart life or vitality to the contract made by the mayor, which was wholly void at its inception. The provision of the charter that every contract, although made in pursuance of a valid ordinance, is to be submitted to and approved by the council before it is final and complete, is designed to hold a check and control over the officer making the contract, and to see that it is made conformably to law; but it does not relate back to or cure defects in the ordinance itself.— *Id.*

8. *Legislature — Powers, delegation of — City Council — Improvement of streets.*— The Legislature, in the delegation of power in the city charter, had the undoubted right to impose such restrictions as it saw proper; and if it deemed it proper and wise to require an act of legislation on the part of the city council in the matter of the repavement of the streets, or that they should act in a certain way or on certain conditions, the requirements must be complied with, else the proceedings will be void. A municipal corporation must conform strictly to the statute giving it power, or its acts will have no vitality. — *Id.*

ST. LOUIS, CITY OF—(*Continued.*)

9. *City of St. Louis — Streets, repaving of — Power of, to be exercised by ordinance.*— The power of ordering the streets to be repaved could be exercised only by passing an ordinance, when the city council deemed it necessary, or when a petition was presented by the owners, or a major part of those owning lands or lots in any paved street, requesting it to be done. There is no other mode pointed out by the charter, and the mode here expresses the measure of power.—*Id.*

10. *Congress, right to delegate powers, compared with that of a city council.*— Cases where Congress has delegated its powers to the President bear no analogy to those where a city council delegates powers to a mayor. In the one case, by every rule of construction, the corporation is confined within the limits of its chartered powers. In the other case, the government is invested with the attributes of sovereignty, and always has resorted, and must resort, to many things lying within the vast domain of implied power.— *Id.*

11. *St. Louis, City of—Charter — District sewers, ordinance concerning — Engineer, delegation of power to.* — Section 16, chapter 8, of an act entitled "An act to revise the city charter of the city of St. Louis," approved March 19, 1866 (Sess. Acts 1865-6, pp. 297-8), giving the city council power to construct district sewers, provides that "such sewers shall be of such dimensions as may be prescribed by ordinance." *Held,* that ordinance 5875, providing that a sewer therein authorized to be constructed on the premises of appellant should be "of such dimensions and of such materials as may be deemed requisite by the city engineer," was not in legal conformity with said provision of the charter, and should be disregarded. The city council cannot delegate a duty plainly and expressly devolved upon them to the mere discretion and caprice of a single individual.—City of St. Louis, to use of Murphy, v. Clemens, 395.

12. *Charter—Corporations, acts of, must be performed comformably to requirements of charter.*— The rule is well settled that corporations are the mere creatures of the law, established for special purposes, and deriving all their powers from the acts creating them. The corporate acts must not only be authorized by the charter, but these acts must be done by such officers or agents, and in such manner, as the charter directs.— *Id.*

13. *City of St. Louis — Charter — Sewers — Special taxes — Lien — Evidence.*— Under the provisions of section 16 of art. VIII of the act to revise the city charter of the city of St. Louis (Sess. Acts 1865-6, p. 298), certified tax bills for assessments against real estate for cost of district sewers are *prima facie* evidence of the validity of the charge against the property therein described, and of the liability of the persons therein named as the owners of said property. The charge is made a specific lien upon the property.— City of St. Louis, to use of Creamer, v. Bernoudy, 552.

14. *City of St. Louis — Charter — Sewers — Assessments — Legal and equitable owner.*— Where a special tax bill was issued upon an assessment for work which was a lien upon the property: *held,* that it was properly made out in the name of the equitable and beneficial owner of the property, and the name of the trustee who owns the legal title need not be inserted in the bill.— *Id.*

15. *Conveyances — City of St. Louis — Deed by mayor need not recite his authority to act.* — Where, under a resolution of the city council of St. Louis which directed the mayor to execute a deed of certain real estate to the

ST. LOUIS, CITY OF—(*Continued.*)

legal representatives of A., and the deed was made to B. without stating that he was the legal representative of A., but recited that it was made under a compromise sale in pursuance of a resolution of the city council, naming the date when the resolution was approved: *held*, that the deed contained a good title on its face, and must be considered presumptive or *prima facie* evidence of title. Deeds by municipal officers acting under ordinances or resolutions of the law-making power of the corporation need not recite the ordinances or resolutions, nor show on their face that the contingency has happened which would authorize the sale.—Jamison v. Fopiana, 565.

16. *Trusts and trustees, rules governing—City authorities.*—The rules that govern trustees in the execution of their trusts do not apply to city authorities.—*Id.*

SALES.

1. *Personal property, sale of—Right acquired by vendee.*—The vendor of personal property can convey to the vendee no higher title than he himself holds (excepting in case of commercial paper transferable by delivery). If the property sold has been obtained by the vendor by theft, or finding, or any other means, without the consent of the owner, the owner can claim restitution from the vendee, although it be sold and purchased *bona fide* and for a valuable consideration.—Wilson v. Crocket, 216.

2. *Property taken in war, title to—Evidence.*—The government may acquire a perfect title to property by capture from the enemy in time of war. And any person using his property or permitting it to be used for unlawful purposes against his government might render it liable to condemnation and forfeiture, but to justify a transferrence of title under this prerogative power the facts must exist. Mere possession by an officer of the United States army will not establish the title. The facts of the capture or forfeiture must appear.—*Id.*

3. *Sale—Gross inadequacy of consideration—Fraud.*—As a general proposition, inadequacy of consideration is not of itself a distinct principle of relief in a court of equity. Nevertheless, where the transaction discloses such unconscionableness as shocks the moral sense and outrages the conscience, courts will interfere to promote the ends of justice and defeat the machinations of fraud.—Hannibal & St. Joseph Railroad Company v. Brown, 294.

4. *Practice, Civil—Supreme Court—Reversal of judgment, effect of, upon sales.*—Where a judgment was reversed in the Supreme Court, and declared to be null and void, all of the proceedings had in pursuance of that judgment were vacated, and defendant was entitled to be restored to the condition in which he stood previous to the judgment, and to restitution of everything that he had lost, and which remained in the hands of the adverse party, his agents, attorneys, or privies; and no suit is required to set aside a deed of land bought by an attorney of plaintiff in such judgment upon execution sale of defendant's property.—*Id.*

5. *Execution—Sale of land at third term from date of; of what force—Construction of statute.*—Where an execution was made returnable to the June term, 1864, and certain land was levied upon in the meantime, but by order of plaintiff no sale was made at the June or September term, but at the December term the same was sold under the original execution, without any new levy, the execution merely reciting the previous levy: *held*, that under

SALES — (*Continued.*)

the act of 1863 (Sess. Acts 1863, p. 20), the execution continued in force, and the sale was valid.— Stewart v. Severance, 322.

6. *Execution sale — Conspiracy to depress bidding.*— Defendants have the unquestioned right to agree among themselves that at the execution sale they will bid an amount sufficient to save themselves harmless from liability, and the sale should stand, notwithstanding it may have inured greatly to their benefit, unless it be shown that there was a conspiracy to depress the bidding. — *Id.*

7. *Contracts — Sale — Resale of goods forwarded — Money paid by mistake, action for.*— Where defendant agreed to furnish plaintiff's intestate with tobacco for resale by the latter, and by the terms of the contract the purchase money did not become due until after the resale was effected, and the testimony showed no pretense that the property was taken to sell on commission, or that it was in any event to be returned and the sale treated as ineffectual: *held*, that the provision in relation to the payment did not suspend the transfer of the title, but that the sale was complete and the title passed when the goods were delivered and the purchaser put in possession and control of them. In such case the property would, after the transfer, be at the risk of the plaintiff; and *semble*, that, in case of loss thereof by fire, plaintiff could not recover back money unadvisedly paid for the same by his clerk.— Blow, Adm'r, v. Spear, 496.

8. *Contracts—Sale—Property delivered to be paid for on resale, not returned in a reasonable time—Presumption.*—Where property is sold and delivered, to be paid for upon a resale, the purchaser must either return the money or the property, whatever may happen in the meanwhile. If the property is not returned in a reasonable time, a resale will be presumed.—*Id.*

See ATTACHMENTS, 4. CONTRACTS, 1. EXECUTIONS, 2, 3, 4, 9, 10, 11, 12. FRAUDS AND PERJURIES, 1, 2. LANDLORD AND TENANT, 3. RAILROADS, 1, 2, 3, 4. TRUSTS, 1.

SECRETARY OF STATE.

See OFFICERS, 8, 9.

SERVANTS.

See CORPORATIONS, 3, 4.

SET-OFF.

See PRACTICE, CIVIL, 2.

STAMP.

1. *Contract, action on — Omission of stamp, effect of under acts of Congress, where evidence showed no intention to evade provisions of the acts.*— Where defendant, in his answer to an action on a contract which was unstamped at the commencement of the suit, admitted the execution of the instrument without alluding to its legality under the stamp acts: *held*, that he thereby admitted its validity, and, *semble*, that he could not raise that issue afterward; and *held*, also, that even if he raised the question by the pleading, it was competent to show that the omission was not made "with intent to evade the provisions of the act" of Congress requiring the stamp.—Whitehill v. Shickle, 537.

STATUTE, CONSTRUCTION OF.

1. *Statute, construction of — Penal and remedial.* — Cases within the reason though not within the letter of a statute are embraced by its provisions; and cases not within the reason, though within the letter, must be taken to be within the statute. A statute which is penal to some persons, provided it is beneficial generally, ought to be equitably construed.—State v. Canton, 51–2.

2. *County Court — Schools — Mortgages — Power of sale by court without notice — Construction of statute.* — Where the owner of land borrowed five hundred dollars of the County Court, and secured the amount, under the provisions of the school act of 1839, by mortgage of the land, the court properly ordered the sheriff to sell, and he properly proceeded to sell the premises without giving the mortgagor notice of their proceedings. (R. C. 1855, pp. 1424–5, §§ 23–27, 30.) The ten days' notice mentioned in section 18 of the school act (R. C. 1855, p. 1424, § 24) refers expressly to the order to give a new security or make such payment as is necessary for the security of the fund, and not to the fact that the interest or the mortgage note is due. —Hurt v. Kelly, 238.

3. *Mandamus — Clerk — Term of office — Elections — Constitution — Vacating ordinance — Construction of statute.* — Under section 22, article VI, of the State constitution, the term of office of the clerk of a Circuit Court expired in January, 1867, even though in 1864 he had been elected for four years, and after the office had been declared vacant by the ordinance of March 17, 1865, and in pursuance of the provisions of that ordinance he had been reappointed "for the remainder of his term of office." But where no election of clerk was had in 1866, as provided in section 22, article VI, the prior incumbent, under the constitution, held over until the election and qualification of his successor.—State *ex rel.* McHenry v. Jenkins, 261.

4. *Practice, Civil — Practice act of 1849 — Decision of court on question of fact, informalities in.* — In a decision on trial of a question of fact by the court, under the statute of 1849 (Laws 1849, p. 90), where the facts are fully found, and judgment is given and is a necessary result of the facts, the judgment is not invalidated by reason of an informality in the order of statement of the facts and the conclusions of law.—Smith v. Harris, 557.

5. *Practice, Civil — Practice act of 1849 — "Case made" by applicant for review, what sufficient.* — Under the law of 1849 (Laws 1849, p. 90), the requirement to "make a case" is necessary for the purpose only of bringing up a matter for review; and when "so much of the evidence as may be material to the question" is brought up, accompanying the motion for review, the rule is satisfied, and it is immaterial whether the application be called "a motion for new trial and application for review," accompanied by the evidence, or a case containing the evidence.— *Id.*

See BANKS, 7. CORPORATIONS, 1, 2, 3, 4, 8. COURT, DISTRICT, 2. DOWER, 3, 4. EXECUTIONS, 8. HUSBAND AND WIFE, 3. JUDGMENTS, 7. JURISDICTION, 5. LIMITATIONS, 4, 5. MANDAMUS, 1, 4. OFFICERS, 1, 2, 3, 7, 8. ORDINANCES, CITY, 1. PRACTICE, CIVIL, 1. PRACTICE, CIVIL — APPEALS, 1, 2, 5, 6, 8. PRACTICE, CIVIL — PLEADINGS, 4, 11. PRACTICE, CRIMINAL, 3. QUO WARRANTO, 1. REGISTRATION, 1. REVENUE, 1, 2, 3, 4, 5, 6. ST. LOUIS, CITY OF, 3, 4, 5, 8, 11, 13.

STOCKHOLDER.

See BANKS AND BANKING, 1. CORPORATIONS.

STREETS.

See St. Louis, City of. Damages.

SURETY.

See Bills and Notes, 5.

T

TRESPASS.

1. *Joint trespassers — Evidence — Complicity.*— Any person who is present at the commission of a trespass, encouraging or exciting the same by words, gestures, looks, or signs, or who in any way, or by any means, countenances or approves the same, is in law deemed to be an aider and abettor, and liable as a principal; and proof that a person is present at the commission of a trespass, without disapproving or opposing it, is evidence from which, in connection with other circumstances, it is competent for the jury to infer that he assented thereto, lent to it his countenance and approval, and was thereby aiding and abetting the same.— McMannus v. Lee, 206.

2. *Landlord and Tenant — Use and occupation, action of — Trespasser.*— A trespasser cannot be sued for use and occupation, nor can the landlord waive the tort and proceed against him as a tenant.— Edmonson v. Kite, 176.

TRUSTS.

1. *Trusts — Purchase of trust property by trustee.*— Trustees, agents, administrators, guardians, attorneys, or others, whose connection with any other person is such as to establish a confidential relation between them concerning his property, or give them special knowledge and opportunities in regard to it, cannot without, and often cannot with, his full knowledge and consent, become the purchasers of such property, even though the sale was at public auction, *bona fide*, and for a fair price. And the rule applies although the trustee was a mortgagee with power to sell, and was also a creditor.— Thornton v. Irwin, 153.

2. *Administrator — Mortgages — Trusts.*—Where the administrator of a mortgagee sold the property under the mortgage, and bought the property at such sale, and afterward sold it for a higher price, he did not thereby become a trustee for the mortgagor for the profits. He is a trustee for the beneficiary, but not for the debtor; as to the trust the debtor is a stranger. The administrator stands in the shoes of the deceased; and a mortgagee is not within the rule forbidding trustees or agents from purchasing estates with which they have been intrusted. If mortgagees are not, neither are their personal representatives.— Woodlee v. Burch, 231.

3. *Administrator — Responsibility to estate.— Semble:* that an administrator of a mortgagee, who sells the property under the mortgage, buys it himself, and sells it at a higher price, may be held accountable to the estate for the profit arising from such purchase and sale.— *Id.*

4. *Trusts and trustees, rules governing — City authorities.*— The rules that govern trustees in the execution of their trusts do not apply to city authorities.— Jamison v. Fopiana, 565.

See Mortgages and Deeds of Trust.

U

USAGE.

See EVIDENCE, 6, 7.

USE AND OCCUPATION.

See LANDLORD AND TENANT.

V

VACANCIES.

See OFFICERS, 2, 3.

W

WILLS.

1. *Wills — Probate of — Evidence concerning.* — The certificate of probate granted by the clerk of the County Court is not conclusive either for or against the admission of the will to probate; and without an order made by the County Court, at its next term thereafter, confirming his act, it would constitute no sufficient evidence that the will had been duly admitted to probate. The probate of a will is a judicial act, the best evidence of which is the order of the court confirming the act of the clerk, and it is only to be ascertained by the records of that tribunal. But when recorded in the manner required by law, with the proof of its execution indorsed upon it and certified by the clerk, it may be inferred that the order of the County Court admitting it to probate had been made, although no certificate of such fact was attached to the copy produced in evidence. — Creasy v. Alverson, 13.
2. *Wills — Devise of lands — Mistake in description — Extrinsic evidence.* — Where a devised tract of land was described in the will as "the west half of the northeast quarter of section thirty-three, township sixty, of range six, containing eighty acres, and situated in the county of Marion," but this description showed that such a tract could not be located in that county, extrinsic evidence might properly be introduced to show that the west half of the northeast quarter of section *three*, in township *fifty-nine*, range six, was owned and claimed by the testator; that it was in Marion county, and adjoined another tract devised to the same son; while the tract described in the will was really in the county of Lewis, and owned and occupied by a different person altogether; and further, that the tract was improperly described in the will by a mistake of the person who drew it up. — *Id.*

WITNESSES.

See ARBITRATION AND AWARD, 1. EVIDENCE. HUSBAND AND WIFE, 3, 4.